90-237

No. ——

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ORSCHELN BROTHERS TRUCK LINES, INC., BARRY S. SCHERMER, TRUSTEE, ASSIGNOR and CARRIERS TRAFFIC SERVICE, INC., ASSIGNEE,

Petitioners,

v.

ZENITH ELECTRONICS CORPORATION f/k/a ZENITH RADIO CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH L. STEINFELD, JR.*
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QUESTION PRESENTED FOR REVIEW

Does a claim of unreasonable carrier practices based upon the existence of an unpublished rate agreement between a carrier and a shipper constitute a defense to an action at law to recover tariff charges pursuant to 49 U.S.C. Section 10761(a) and 11706(a)?

LIST OF PARTIES

Petitioner Carriers Traffic Service, Inc. (hereinafter "CTS") is an Illinois corporation engaged in freight bill auditing and is the assignee of the assets that are the subject matter of this writ. Petitioner Orscheln Brothers Truck Lines, Inc. (hereinafter "Orscheln") was a Missouri corporation previously engaged in for-hire motor carrier transportation in interstate commerce. Petitioner, Barry S. Schermer is the Trustee for Orscheln who assigned the assets with Court approval to CTS. Respondent Zenith Electronics Corporation (hereinafter "Zenith") is a Delaware corporation engaged in the purchase and sale of electronics products.*

* There are no parent or subsidiary companies to be listed for the corporations named in this List of Parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL BASIS	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
I. THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INCLUDING THIS COURT'S MOST RECENT DECISION IN *MAISLIN INDUSTRIES*	3
CONCLUSION	6
APPENDIX A	1a
APPENDIX B	12a
APPENDIX C	14a
APPENDIX D	50a
APPENDIX E	52a

TABLE OF AUTHORITIES

Cases: Page

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 4

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 58 U.S.L.W. 4862 (U.S. June 21, 1990) *rev'd* 879 F.2d 400 (8th Cir. 1989) ..... *passim*

Orscheln Bros. Truck Lines, Inc. v. Zenith Electronic Corp., 708 F. Supp. 845 (N.D. Ill. 1988) 2

Orscheln Bros. Truck Lines, Inc. v. Zenith Electronic Corp., 899 F.2d 642 (7th Cir. 1990) 1, 4

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. 336 (1982) 4

Administrative Decisions:

NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 4

Statutes:

28 U.S.C. Sec. 1254(1) 2

49 U.S.C. Sec. 10701(a) 2

49 U.S.C. Sec. 10761(a) ..... *passim*

49 U.S.C. Sec. 11706(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. —

ORSCHELN BROTHERS TRUCK LINES, INC., BARRY S. SCHERMER, TRUSTEE, ASSIGNOR and CARRIERS TRAFFIC SERVICE, INC., ASSIGNEE,

Petitioners,

v.

ZENITH ELECTRONIC CORPORATION f/k/a ZENITH RADIO CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 899 F.2d 642 and is reprinted at Appendix "A". The unreported order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Suggestion for Re-hearing is reprinted at Appendix "B".

The order and judgment of the United States District Court for the Northern District of Illinois (Moran, J.) granting partial summary judgment for Petitioners, and

granting partial summary judgment for Respondent is reported at 708 F. Supp. 845 and reprinted at Appendix "C" and "D". The administrative decision of the Interstate Commerce Commission ("ICC") finding the collection of the undercharges to be an unreasonable practice is reprinted at Appendix "E".

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Seventh Circuit was dated, filed and entered on April 10, 1990. A suggestion for rehearing en banc was denied on May 9, 1990. This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

49 U.S.C. Section 10701. Standards for Rates, Classifications, Through Routes, Rules, and Practices.

> (a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

49 U.S.C. Section 10761. Transportation prohibited without tariff.

> (a) Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff. . . .

STATEMENT OF THE CASE

Orscheln was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Orscheln operated under Title 49 of the United States Code which governs transportation in interstate commerce. CTS purchased this cause of action from Barry S. Schermer, the Trustee for Orscheln.

Pursuant to 49 U.S.C. Sections 10761(a) and 11706 (a), CTS undertook to recover freight charges from Zenith by filing a civil action in the United States District Court for the Northern District of Illinois. Upon receipt of the ICC's findings after referral, the District Court requested both parties to prepare cross-motions for summary judgment. Judge Moran granted judgment in favor of Orscheln with respect to the negotiated rate claim but denied summary judgment as to the notation issue. Judge Moran's grant of summary judgment to Orscheln was reversed by the U.S. Court of Appeals for the Seventh Circuit. On May 9, 1990, the Court of Appeals denied Orscheln's suggestion for rehearing en banc. Petitioners appeal the Seventh Circuit's reversal of summary judgment for Orscheln.

REASON FOR GRANTING WRIT

I. THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INCLUDING THIS COURT'S MOST RECENT DECISION IN *MAISLIN INDUSTRIES*

The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction over carrier "practices". The question is whether a voluntary, mistaken, or intentional deviation from a tariff rate nullifies the requirements of 49 U.S.C. Section 10761(a) so as to defeat a motor common carrier's right and duty to collect its lawful tariff charges. Neither the ICC nor the courts,

acting either individually or in concert with one another, have the authority to waive the requirements of section 10761(a) on the basis of secret agreements that result in departure from lawful tariff rates. *See Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 58 U.S.L.W. 4862 (U.S. June 21, 1990) *rev'd* 879 F.2d 400 (8th Cir. 1989); *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

Maislin Industries settled an inter-circuit split on the effects of the ICC's decision in *NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989) ("Negotiated Rates"). The Seventh Circuit was aware of the split within the Circuits and realized that this Court was entertaining final resolution of the controversy when it noted at the end of its decision, "[t]he Supreme Court will soon resolve the conflict; *Maislin* is scheduled to be argued at the end of this month." 899 F.2d at 647. Subsequently, this Court issued its decision in *Maislin Industries*. In *Maislin Industries* this Court struck down the ICC's *Negotiated Rates* policy and upheld the sanctity of the filed tariff. This Court stated:

> Labeling the carrier's conduct an "unreasonable practice" cannot disguise the fact that the ICC is justifying deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate. Stripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the Commission's interpretation of "unreasonable practices" thus stands revealed as flatly inconsistent with the statutory scheme as a whole and §§ 10761 and 10762 in particular.

58 U.S.L.W. at 4866 (citations omitted).

This Court further clarified its position regarding "unreasonable practice" defenses to the duly filed tariff by stating:

> We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule . . . Negotiated Rates policy rests on interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

58 U.S.L.W. at 4865.

Justice Stevens writing for the dissent in *Maislin Industries* cites with approval from Judge Posner's opinion in this case. 58 U.S.L.W. at 4870. However, Justice Scalia's concurrence noted the folly of Judge Posner's reasoning opining that although the skeleton of regulation may remain "it is the skeleton we are construing." 58 U.S.L.W. at 4868. Therefore, the *Maislin Industries* decision is completely dispositive of this writ as it clearly reverses the opinion of the Seventh Circuit.

CONCLUSION

The decision below subverts a Congressionally fashioned regulatory scheme by allowing motor common carriers and their customers to freely negotiate prices without complying with the requirements of Section 10761 (a). Congress has neither eliminated nor altered the strict tariff adherence requirements of the Act for motor common carriers; and until it does, equitable defenses are statutorily barred in actions at law such as the present proceedings.

The Petition of Orscheln should be granted therefore and a decision rendered in accordance with this Court's *Maislin Industries* opinion. Accordingly, Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-1261, 89-1329, 89-1330

ORSCHELN BROS. TRUCK LINES, INC.,
BARRY S. SCHERMER, Trustee and Assignor, and
CARRIERS TRAFFIC SERVICE, INC., Assignee,
Plaintiffs-Appellants,

v.

ZENITH ELECTRIC CORP.,
Defendant-Appellee,

and

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Intervening-Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 8638—James B. Moran, *Judge.*

ARGUED JANUARY 10, 1990—DECIDED APRIL 10, 1990

Before POSNER, RIPPLE, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* A motor carrier's trustee in bankruptcy sued a shipper to recover moneys that the

applicable tariffs required the shipper to pay. The shipper argued that the carrier's attempt to collect the money due under the two tariffs in question was, in the circumstances, an unreasonable practice, forbidden by 49 U.S.C. § 10701(a). The doctrine of primary jurisdiction requires that the reasonableness of a carrier's practices be evaluated in the first instance by the Interstate Commerce Commission. *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-70 (1956); *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016, 1020-22 (9th Cir. 1990); *Seaboard System R.R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). The district court therefore stayed the case to permit the shipper to make application to the Commission, but in addition referred the matter to the agency explicitly so that any appeal from the Commission's order would go back to the district court rather than come directly to us as it would if there were just a stay and no reference. 28 U.S.C. § 1336(b); *Railway Labor Executives' Ass'n v. ICC*, 894 F.2d 915 (7th Cir. 1990). On reference, the Commission ruled for the shipper. *Zenith Electronics Corp.—Applicable Tariffs—Petition for Declaratory Order*, No. 40059 (ICC July 29, 1987) (unpublished). The case then returned to the district court, where the carrier asked the district judge to set aside the Commission's ruling and the shipper asked him to uphold it. The judge split the difference. He agreed with the Commission insofar as it held unreasonable the tariff requiring an express notation on the bill of lading that the shipper is doing the loading and unloading in order to entitle the shipper to a lower tariff than if the carrier performs these services. But he disagreed that it was unreasonable for the carrier to collect a rate higher than the rate it had negotiated with the shipper, since the higher rate was the one in the applicable tariff. The shipper, joined by the Commission, appeals from the latter ruling. The carrier filed a cross-appeal, challenging the judge's ruling on the notation requirement, but has abandoned that appeal in light of our

decision in *Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989). *Carriers Traffic Service* upheld the Commission's invalidation of the notation requirement in a suit to which the carrier in this suit was a party along with its trustee in bankruptcy and the assignee of its claims against the shipper.

Section 10761(a) of the Transportation Code, a provision that derives ultimately from section 6(7) of the original Interstate Commerce Act of 1887, 24 Stat. 380, provides that a carrier may collect only the rates contained in the tariffs that it has filed with the Commission. The statute does not, however, specify the consequences of a discrepancy between the rate actually charged and the rate in the tariff. No one doubts that if the carrier charges a shipper more than the filed rate, the shipper is entitled to a refund. The trickier case is where the carrier charges the shipper *less* than the filed rate; shall the carrier *always* be entitled to recover the difference between what it charged and the filed rate, regardless of the circumstances?

The affirmative answer goes by the name "filed-rate doctrine," to which shippers might want to attach the prefix "infamous." Invented (so far as we have been able to determine) by the Interstate Commerce Commission in its regulation of railroads under the original Interstate Commerce Act, *Kansas City Southern Ry. v. Carl*, 227 U.S. 639, 652-53 (1913); *Poor v. Chicago, Burlington & Quincy Ry.*, 12 I.C.C. 418, 421-25 (1907), the doctrine was approved by the Supreme Court, e.g., *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); *Louisville & Nashville R.R. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924) (Brandeis, J.), and was extended to motor carriers when they were brought under the Commission's domain by the Motor Carrier Act of 1935. The operation of the doctrine in the motor carrier setting is illustrated by *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982), which involved the

same notation-of-loading tariff as is involved in the *Carriers Traffic Service* case and in the present case.

To understand the purpose of the filed-rate doctrine and hence the Commission's recent efforts to relax it, on which see *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Buckeye Cellulose Corp. v. Louisville & Nashville R.R.*, 1 I.C.C.2d 767 (1985), affirmed as *Seaboard System R.R. v. United States*, *supra*; *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989), one must understand the history of federal regulation of common carriers. Railroads have heavy fixed costs, and in their heyday faced little effective competition from other modes of transportation. Naturally they tended to load the fixed costs onto those shippers who had poor competitive alternatives and to charge low prices to those shippers who had good alternatives by reason of (for example) being big enough to induce two or more railroads to serve their plants. This created a disparity in transportation costs painful to shippers who paid high railroad rates and were competing with shippers who paid low rates, and it also undermined the railroads' efforts to cartelize railroad transportation. The confluence of interests between railroads and weak shippers resulted in a regulatory scheme in which railroads were forbidden both to price off tariff and to refuse service to any shipper at the tariffed rate. *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F.2d at 1230-31. The scheme would have been undermined if carriers had been permitted to negotiate secret discounts with favored shippers. *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). To deter this was the office of the filed-rate doctrine. It authorized carriers to recover the discounts regardless, which meant that the shipper could not count on being able to keep any discount that the railroad might dangle before it. Motor carriers do not have heavy fixed costs, but

they do not like competition any more than railroads do, so when in 1935 they were brought under federal regulation (in major part to protect the railroads from their competition) they were placed under the filed-rate doctrine too.

Many years later came deregulation, which has changed the trucking industry beyond recognition. As a result of amendments made to the Motor Carrier Act in 1980 and their interpretation by the Commission, the present regime is essentially one of free competition. No longer does the ICC seek to nurture and protect cartel pricing and division of markets. A motor carrier that wants to lower its price can file a new tariff effective the following day. *Short Notice Effectiveness for Independently Filed Motor Carrier & Freight Forwarder Rates*, 1 I.C.C. 2d 146 (1984), affirmed as *Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985). No longer does the Commission seek to limit the number of motor carriers, which has more than doubled in less than a decade. Most important, a carrier and shipper who want to get out from under tariff regulation altogether have only to negotiate a contract of carriage, and then the lawful price is the price in the contract rather than in any filed tariff. There used to be all sorts of restrictions on contract carriage, which greatly limited it as an escape hatch from regulation. There are no longer. *Wheaton Van Lines, Inc. v. ICC*, 731 F.2d 1264 (7th Cir. 1984). The skeleton of regulation remains; the flesh has been stripped away.

Counsel for the carrier in this case—which is to say for the carrier's trustee in bankruptcy—conceded at argument that the motor carrier industry is today highly competitive. But if so, the filed-rate doctrine has lost its raison d'être. The classic explanations for the doctrine are from a different world. "If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the

great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be adandoned." *Poor v. Chicago, Burlington & Quincy Ry., supra*, 12 I.C.C. at 421. "Stability and equality of rates are more important to commercial interests than reduced rates." *Id.* at 422. "Occasional hardships may result from any inelastic rule of general application. The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points." *Id.* at 423.

Cessante ratione legis, cessat et ipsa lex. Firms in a competitive market cannot discriminate against weak shippers, for even the weak shipper has, by definition of competition, alternative sources of supply to which to turn if one of his suppliers tries to make a monopoly profit off him. "In the more competitive, more flexible pricing atmosphere created by [deregulation], there is little likelihood of carriers using a rate misquotation as a means to discriminate in favor of particular shippers." *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, supra*, 5 I.C.C.2d at 625. And since it is no longer the policy of Congress or the ICC to foster monopoly pricing in the motor carrier industry, no public object is served by forcing carriers to adhere to published price schedules regardless of circumstances. All this the Commission found and persuasively articulated in *National Industrial Transportation League, supra*, 3 I.C.C.2d at 104-08.

Strict, mechanical adherence to the filed-rate doctrine produces absurd results well illustrated by the present case. The carrier and the shipper negotiated a mutually attractive rate. The carrier told the shipper that the rate was in a tariff that it had just filed. The shipper could have checked, because there are "watching services" to which one can subscribe that check the tariff filings in

the Commission every day. But the shipper did not consult a watching service and through some inadvertence the carrier neglected to file the tariff. (Maybe it was because of a pattern of inadvertence that the carrier later went broke.) The shipments were made, and the shipper paid the agreed-on price, which it believed was the tariffed price. Years passed. The carrier went broke. The trustee in bankruptcy—unconcerned about the effects on customer good will of suing for undercharges, because the carrier was being liquidated—combed through the carrier's invoices, looking for deviations from the tariffed rates. This is a pastime of trustees of bankrupt carriers. *Id.* at 99; *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F.2d at 1229-30; *Inman Freight Systems, Inc. v. Olin Corp.*, 807 F.2d 117 (8th Cir. 1986). The trustee found that the tariff which the shipper had thought the carrier had filed had not been filed, and he brought this suit.

The suit serves no social purpose, yet Congress has not amended section 10761(a), which by stating that carriers shall price only in accordance with their filed tariffs (a "carrier may not charge or receive a different compensation . . . than the rate specified in the tariff") enacts, in the view of the carrier, the filed-rate doctrine. The Interstate Commerce Commission has no authority to repeal a section in an Act of Congress, even if Congress itself would surely have done so had it realized how the section interacted with the amendments it was making to the Act. But this is not what the Commission has done. Section 10761(a) does not enact the filed-rate doctrine. It does require pricing in accordance with published tariffs, but it does not prescribe the consequences if the parties deviate from the tariff by mistake. It is the filed-rate doctrine that prescribes them, and the doctrine emanates not from section 10761(a) alone but also from the requirement in sections 10701(a) and 10704(a)(1) that a carrier's practices be reasonable.

The Commission has not modified any statute. It has modified a Commission-made doctrine by holding that the carrier who leads the shipper to believe that there was a tariff on file covering the agreed shipment at the agreed price will be estopped to contend otherwise—will in other words be guilty of an unreasonable practice. The analogy is to a statute like 42 U.S.C. § 1983 that defines an actionable wrong but leaves to the courts the task of filling in the remedial details through doctrines of immunity and the like. Section 10761(a) creates the basic prohibition, but it is left to the Commission, in the exercise of its broad discretionary powers under the reasonable-practice provisions of the Transportation Code, to shape the remedy for violations of the prohibition.

It is in failing to consider the interplay between section 10761(a), which requires pricing in accordance with filed tariffs, and sections 10701(a) and 10704(a), which require carriers to adhere to reasonable practices, that the Fifth Circuit went astray (we respectfully suggest) in *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), the case that created an intercircuit conflict on the validity of the Commission's new approach to filed-rate questions. The Fifth Circuit treated the filed-rate doctrine as an interpretation of section 10761(a) that the Supreme Court had, by approving, placed beyond power of change by the Commission, by a lower federal court, or perhaps by any body other than Congress. But all that section 10761(a) requires is pricing according to filed tariffs. The proposition that a deviation from such pricing, however innocent, should exact from the shipper the forfeiture of his bargain in any and all circumstances is an interpretation of the concept of a reasonable practice, a concept the provenance of which is section 10701(a) rather than 10761(a).

A statute that creates a norm of reasonableness is open-ended; what is unreasonable at time n may become reasonable at time $n + 1$. As the carrier notes, citing

our decision in *Western Transportation Co. v. Wilson & Co.*, *supra*, the recognition of a defense of estoppel would have been a questionable application of reasonable-practice doctrine in the days before deregulation. The overriding regulatory purpose then was to deter the shipper from accepting an off-tariff price. It was promoted by denying the shipper any defense if the price turned out to be an off-tariff one, because "billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers." *Poor v. Chicago, Burlington & Quincy Ry.*, *supra*, 12 I.C.C. at 421. Now that off-tariff pricing is harmless to the (de)regulatory scheme, the only purpose served by making the statutory obligation to price in conformity with published tariffs draconian is to provide windfalls for unsecured creditors in bankruptcy. The Commission invented the filed-rate doctrine, and because the doctrine is an interpretation of reasonable practice, can modify it when changed circumstances, legal and factual, counsel modification.

The footings of this conclusion are strengthened if we attend carefully to the precise mode by which the Commission invented the filed-rate doctrine. When carriers used to sue for undercharges in cases such as this, the shipper would attempt to defend by reference to the statutory prohibition of unreasonable practices in section 1(4) of the original Interstate Commerce Act, 24 Stat. 379, now 49 U.S.C. § 10701(a). The defense failed; the practice of suing for undercharges regardless of the circumstances was reasonable, given the regulatory scheme as it then existed. The regulatory scheme having changed, the practice is no longer reasonable. A standard of reasonableness, which is the standard in section 10701(a), is elastic to changed circumstances. This, the essential point in our opinion, was overlooked by the Fifth Circuit in *Caravan Cargo*. And in overlooking this point, the Fifth Circuit also overlooked the teachings of the Supreme Court in *Chevron, U.S.A., Inc. v. National*

Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), that courts are not empowered to adopt "a static judicial definition" when "Congress itself had not commanded that definition," and that if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." The Fifth Circuit adopted a static judicial definition of the remedy for off-tariff pricing, overlooking the fact that Congress had not legislated with respect to that remedy but instead had, by use of the term reasonable in sections 10701(a) and 10704(a), confided responsibility for filling in the details of the remedial scheme to the Commission.

Although the Commission is thus empowered to modify the filed-rate doctrine, we are not. This is not only because the doctrine has been approved by the Supreme Court (which itself might invoke stare decisis against any attempt at judicial modification, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)), but also and more fundamentally because we have no authority to forbid carriers' practices on the ground that they are unreasonable. *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F.2d at 1231-32. The standard, the authority, is the Commission's, not the courts' 49 U.S.C. § 10704(a)(1). *Chevron* teaches that the Commission, as the agency charged with administering a complex and open-ended regulatory statute, has the responsibility for the details of administration, including the body of interpretive doctrines by which an agency fleshes out the bare bones ("reasonableness," "public interest," "public convenience and necessity," and so forth) of its organic statute. The filed-rate doctrine is such a doctrine. The agency that created it has rethought its position, modified a doctrine of reasonable conduct, and given plausible reasons for the modification. "[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past ad-

ministrative rulings and practice." *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). This is not a case like *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093-94 (7th Cir. 1984), where the agency changed course without giving reasons.

We reverse so much of the district court's order as disapproved of the Commission' decision. In so doing we join the other circuits—all but the Fifth—that have passed on the question. *West Coast Truck Lines, Inc. v. Weyerhaeuser Co., supra*, 893 F.2d at 1027-28 (citing cases); *Maislin Industries v. Primary Steel Inc.*, 879 F.2d 400 (8th Cir. 1989), cert. granted, 110 S. Ct. 834 (1990). The Supreme Court will soon resolve the conflict; *Maislin* is scheduled to be argued at the end of this month.

AFFIRMED IN PART, REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 89-1261, 89-1329, 89-1330

ORSCHELN BROS. TRUCK LINES, INC.,
BARRY S. SCHERMER, Trustee and Assignor, and
CARRIERS TRAFFIC SERVICES, INC., Assignee,
Plaintiffs-Appellants,

v.

ZENITH ELECTRIC CORP.,
Defendant-Appellee,

and

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Intervening-Defendants-Appellees.

May 9, 1990

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 85 C 8638—James B. Moran, *Judge.*

ORDER

On April 23, 1990, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 8638

ORSCHELN BROS. TRUCK LINES, INC.,
BARRY S. SCHERMER, Trustee and Assignor, and
CARRIERS TRAFFIC SERVICE, INC., Assignee,
Plaintiffs/Petitioners,

vs.

ZENITH ELECTRIC CORPORATION f/k/a
ZENITH RADIO CORPORATION,
Defendant,

and

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

MEMORANDUM AND ORDER

Plaintiffs appeal from the decision by the Interstate Commerce Commission ("Commission" or "ICC") in *Zenith Electronics Corporation—Applicable Tariffs—Petition for Declaratory Order*, No. 40059 (July 29, 1987) ("the ICC opinion"). Plaintiffs seek to set aside and annul that order in whole or in part, while defendants and respondents seek affirmance. Currently pending before the court are cross-motions for summary judgment. We uphold the Commission's decision in part and reverse in part.

FACTS

The plaintiffs/petitioners are as follows: Orscheln Brothers Truck Lines, Inc. ("Orscheln") operated as a motor common carrier, Barry S. Schermer ("Schermer") is the trustee in that firm's bankruptcy proceedings. and Carriers Traffic Service, Inc. ("CTS") is the present party in interest, having purchased the cause of action.

Between March 24, 1981 and August 16, 1983, Orscheln was hired by defendant Zenith Electronics Corporation ("Zenith") to transport 740 truckloads of television cabinets from the Zenith Electronics Corporation at Indiana's ("ZECI") manufacturing facility in Evansville, Indiana, to Zenith's assembly facility in Springfield, Missouri. The charges billed were calculated pursuant to Tariff ICC MWC 226, Item 10090 and Tariff 125-H, Item 578, which states that consignors must load and consignees must unload each shipment. Item 578 provides that at the time of shipment the consignor was to endorse on the bill of lading the notation "shipper load and count and/or consignee must unload." ZECI, as consignor, performed the loading and counting and Zenith, as consignee, performed the unloading in Springfield. These actions were consistent both with the industry custom and with ZECI/Zenith's own course of dealing. ZECI did not, however, endorse the applicable bill of lading with the notation required by Item 578, though Orscheln endorsed 345 bills of lading and 719 freight bills with the notation at issue. Zenith paid the amount charged.

Zenith found Orscheln's rates no longer competitive, and in December of 1981 it discontinued use of Orscheln in the transportation of cabinets from Evansville to Springfield. In January of 1982 Orscheln and Zenith agreed on a lower rate. Orscheln officials represented to Zenith that the negotiated rate had been properly filed with the Commission in Supplement 105 to Tariff ICC MWC 226-D and was therefore effective. Pursuant to

the agreement Orscheln transported 51 truckloads of cabinets from Evansville to Springfield between January 22 and February 17, 1982. Though the negotiated tariff did not become effective until February 18, 1982, Orscheln billed Zenith at the agreed-upon rate and Zenith paid accordingly.

In September of 1982 Orscheln and Zenith agreed on a rate applicable to shipments of finished products from the Springfield plant to various distributors. Prior to any actual shipments Orscheln officials again represented to Zenith that the negotiated rate had been properly filed, this time as OBTL 400, Item 971. Twenty shipments were thereafter tendered by Zenith to Orscheln between September 29 and November 12, 1982, for movement from Springfield to distributors. Though here the negotiated tariff never became effective, Orscheln billed Zenith at the agreed-upon rate and Zenith paid accordingly.

On October 19, 1983, Orscheln filed a Chapter 7 petition and plaintiff Schermer was appointed trustee. Schermer hired plaintiff CTS to conduct an audit of Orscheln's freight bills. CTS discovered that several bills of lading used during the 1981-1983 period were not endorsed by Zenith, as required by Item 578.[1] Notwithstanding the fact that Zenith actually loaded and unloaded the relevant shipments in conformity with industry custom that the shipper load and unload, CTS recomputed the charges under a different, higher tariff because Zenith failed to endorse the bill of lading. The audit also revealed that the negotiated rates forming the basis for Orscheln's bills and Zenith's payments were not published at the time the services were rendered. Orscheln then submitted undercharge statements to Zenith demanding payment of the difference between the higher charges and the previously billed rate. Zenith refused to pay.

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[1] A more detailed explanation of the way by which Item 578 requires the shipper to endorse the bill of lading is contained *infra*.

PROCEDURAL HISTORY

On October 11, 1985, Orscheln filed the instant action pursuant to 40 U.S.C. § 10701 *et seq.*, for the collection of $175,478.69 plus prejudgment interest for freight undercharges on numerous interstate shipments, as prescribed by the relevant tariffs filed with the Commission. On January 23, 1986, Orscheln amended their complaint to show that CTS had purchased the cause of action and thereby became an assignee.

Zenith claimed that the collection of undercharges would constitute an "unreasonable practice" in violation of 49 U.S.C. §10701(a). It moved to stay the action in this court pending the Commission's ruling on, first, whether the notation requirement in Orscheln's filed tariff was unreasonable, and, second, whether the unfiled negotiated rate between the parties was the effective rate. On March 7, 1986, this court granted the stay and referred the matter to the Commission.

On October 29, 1987, the Commission issued its opinion, holding that the notation requirement was unreasonable given the circumstances.[2] Several factors were isolated. First, the Commission concluded that Zenith had complied "substantially" with the tariff requirement by loading, counting and unloading. Second, it found that the accepted practice within the electronics industry is

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[2] We are unable to determine the exact procedural hook on which the Commission hangs its decision. The relevant language is: "The issue before us here is whether the bill of lading notation requirement is a reasonable practice" (ICC op. at 6), and "Under these circumstances, the notation would serve no purpose, and requiring it in order for Zenith to receive the rate would be unreasonable" (*id.* at 6-7). It may have concluded that the notation requirement rendered Tariff MWB 226-D, Item 10090 unreasonable, or that the collection of undercharges in the absence of the notation would have been an unreasonable practice. In either instance, this court follows the same procedure for review and the results would be identical on either peg.

for the shipper and not the carrier to load, count and unload. Third, it noted that no loss or damage claim was filed which would have rendered the notation requirement relevant for liability purposes. And, fourth, it looked to the negotiations between the parties and found that both Zenith and Orscheln received the benefits for which they bargained.

The Commission also held that the collection of undercharges, where the rates were negotiated but not filed, would constitute an unreasonable practice. As is explained *infra*, the Commission had previously established criteria by which to ascertain whether a negotiated rate should be enforced. It concluded the criteria had been met because Orscheln and Zenith had negotiated the rate originally billed and paid, and because Zenith had reasonably relied on Orscheln's representations as to the filing of both the rate which never became effective as well as that which was filed on February 18, 1982.

Orscheln has reduced its claim to $110,671.15 in recognition of the fact that it, as opposed to consignor, notated certain bills of lading. It concedes that notations by the carrier resulted in substantial compliance with the tariff requirement on bills amounting to $64,825.13. The claim is therefore composed of $67,403.48 in notation undercharges and $43,267.67 in filed rate undercharges.[3]

THE STANDARDS OF REVIEW

Pursuant to the Administrative Procedure Act, § 10e, we look to whether the Commission's conclusion is "(a) arbitrary, capricious, and an abuse of discretion, or

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[3] Plaintiffs' reply alleges that the filed rate undercharges are attributable not to the 71 truckload shipments described textually *supra*, but rather to "178 individually rated shipments which moved prior to the effective date of the involved tariffs." *Id.* at 3. We choose not to resolve this factual dispute at this time because, according to the plaintiffs, "there is no dispute as to the amount owed pursuant to the audit, [so] this correction should not prejudice any party." *Id.*

otherwise not in accordance with law, or (b) unsupported by substantial evidence." 5 U.S.C.A. § 706 (1977). Our inquiry is basically limited to deciding "whether there is warrant in the law and the facts for what the Commission has done." *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946). We are particularly reluctant to second-guess the findings of administrative agencies created to employ expertise. *See, e.g., Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806 (1973) ("Congress has . . . delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems") (citations omitted).

The crux of this dispute is over the scope of the Commission's "unreasonable practice" jurisdiction. 49 U.S.C. § 10701(a) is the source for this authority:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

49 U.S.C.A. § 10701(a) (West Supp. 1985). This "unreasonable practice" jurisdiction permits the Commission to evaluate several aspects of transportation policy. The Commission invoked it here to ascertain whether the tariff and collection of undercharges were reasonable.

Orscheln contends that the Commission erred twice, first in determining that the notation requirement was unreasonable and second by ignoring the applicable filed rate.

We substantially defer to the Commission's findings of fact but strictly evaluate whether its application of law is consistent with the Interstate Commerce Act (the "Act"). In particular, this court emphasizes how the

limits imposed by the Act's antidiscrimination purpose circumscribe the Commission's interpretation of its unreasonable practice jurisdiction. As the Supreme Court stated in *NLRB v. Brown*, 380 U.S. 278 (1965):

> Reviewing courts are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying the statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions . . . [w]here, as here, the review is not a question of fact, but of judgment as to the proper balance to be struck between conflicting interests, "(t)he deference owned to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major decisions properly made by Congress."

Id. at 291-92 (citations omitted). "The federal courts have played an important role in ensuring that agency decisions are not arbitrary and capricious and are based upon the concerns which Congress intended the agency to consider." *Marcus v. Bowen*, No. 85 C 453, slip op. at 46-47 (N.D. Ill. Sept. 22, 1988). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1220-21 (1987); *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984),[4] *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980); *United States v. Larionoff*, 431 U.S. 864, 873 (1977). Thus the Com-

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[4] *Cardoza-Fonseca* extensively discussed deference to administrative agencies in light of *Chevron*. *See Cardoza-Fonseca*, 107 S.Ct. at 1220, n.29. In *Chevron* the Court recognized the deference due statutory interpretations by administrative agencies where Congress did not intend to answer the question at issue. *Cardoza-Fonseca* held that deference is inappropriate where the agency's interpretation is inconsistent with expressed congressional intent.

mission's interpretation of its unreasonable practice jurisdiction might be found contrary to law were it to conflict with the Interstate Commerce Act. Our inquiry therefore looks to whether the Commission's factual determinations were supported by substantial evidence and whether the application of unreasonable practice jurisdiction is consistent with the requirement of the Act.

DISCUSSION

As discussed hereinafter, the Interstate Commerce Act has, historically, had an antidiscrimination touchstone. Because of a Congressional concern, based upon objective experience, that the larger shippers could coerce discriminatory lower rates from carriers, the Interstate Commerce Act prohibited discrimination, required the filing of tariffs and involved the Interstate Commerce Commission in the monitoring of tariffs. The courts, recognizing the purposes of the Act, adopted the filed rate doctrine—no matter how plausible the reason advanced by the shipper for a lesser rate (including the fraudulent representations of the carrier that the lesser rate controlled), the duly filed rate was the only legal rate. That doctrine necessarily required shippers themselves to monitor the applicable tariffs. With the advent of deregulation in 1980, with its proliferation of negotiated tariffs, the role of the Commission in monitoring tariffs when filed virtually disappeared. The filing requirements and the nondiscrimination objectives of the Act remained. One response to the change was the Commission's amelioration of the rigid filed rate doctrine by looking to the statutory requirement that practices be reasonable—the Commission asserted jurisdiction to determine in particular circumstances whether a rate was reasonable as applied. The Commission has, in effect, introduced equitable concepts into a legal system.

The filed rate doctrine, even in an era of deregulation, serves valuable functions consistent with the Act. First,

the filing of rates furthers competition by enabling shippers to compare and use as a tool in negotiation both the prices of various carriers and also the rates a carrier is charging the shipper's competition. A shipper can complain to the carrier and the Commission were a particular carrier attempting to charge higher than the filed rate. Further, the filing of rates enables a shipper to alert the Commission to reasonableness questions, and the Commission to decide them after a dispute arises. The Commission's incorporation of equitable concepts cannot be interpreted so as to emasculate these other purposes.

Plaintiffs here insist that a filed tariff controls, that it must be followed without deviation, and that the Commission cannot ignore tariff requirements for any reason. Defendants (with the concurrence of the Commission) contend that the practicalities and equities control. We agree with the Commission to an extent—it does have jurisdiction to consider the equities in real world circumstances. But we also believe that the nondiscrimination objectives of the Act remain unimpaired and that the "unreasonable practice" jurisdiction exercised by the Commission must be exercised with the continuing validity of those objectives in mind. Accordingly, we uphold the Commission's decision respecting notation undercharges and reverse the Commission's decision respecting filed rate undercharges.

I. Notation Requirement

Item 578 of Tariff ICC MWB 125-H provides that rates subject to the requirement that the consignor load and/or the consignee unload the shipment are also subject to the following provisions:

> (1) At the time of shipment, the consignor must endorse on the Bill of Lading and Shipping Order the notation "Consignor load and count and/or con-

> signee must "unload" the shipment, as the case may be.
>
> * * * *
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> (6) If the consignor fails to comply with the requirements of paragraph (1) herein . . . the rate will not apply and rates otherwise published will be assessed.

Both sides concede that a significant number of the bills of lading failed to contain the shipper's load, count and unload ("SL&C") notation. Orscheln therefore claims that Item 578 renders MWB 226-D, Item 10090, inapplicable, and that a higher class rate applies.

A. *Commission Decision Supported by Substantial Evidence*

By staying the action in this court and moving instead before the Commission, the parties followed the instruction of the Seventh Circuit in *Western Transportation Co. v. Wilson and Company, Inc.*, 682 F.2d 1227 (7th Cir. 1982):

> [I]t does not follow that the shipper is necessarily without a remedy in a case like this. A tariff provision has to be reasonable. See 49 U.S.C. § 10704(a). If it is not, it violates the statutes, and the Commission, either on its own initiative or on complaint, "shall take appropriate action to compel compliance with" the statute. 49 U.S.C. § 11701. If the notation requirement is, as it appears to be, entirely pointless, the Commission can be expected to set aside this part of the tariff—thus knocking the props out from under Western's case—if asked to do so. Wilson should have done what Iowa Beef Processors, Inc., another of Western's customers, did when sued by Western in bankruptcy court on the very tariff in issue in this case—ask for a stay of the court proceedings and then ask the Commission to declare the notation requirement unreasonable.

Id. at 1231.

The Commission held that the notation requirement served no purpose, given the particular circumstances of the case. Since both sides agreed that, consistent with industry custom, the shipper did the loading and unloading, the Commission determined that Zenith was eligible for the published rate notwithstanding its failure to make the proper notations on the bill of lading. We agree with the Commission that the circumstances render the notation requirement unnecessary.

The notation requirement generally serves the function of allocating various burdens of proof. *Dublin Co. v. Ryder Truck Lines, Inc.*, 417 F.2d 777 (5th Cir. 1969). The shipper's notation is an admission of the facts asserted on the bill of lading. With regard to the SL&C endorsement, the notation is particularly important:

> In a claim for loss of damage to goods, the claimant has the initial burden of proving delivery of a greater quantity of goods to the carrier than received. . . . *If no shipper load and count on similar notations appear on the face of the bill of lading*, that bill should establish the presumption that the damage or loss was not occasioned by "an act of the owner or shipper," and the carrier shoud have the affirmative burden of establishing that the loss or damage was, in fact, so caused. On the other hand, if the bill of lading contains shipper load and count or similar notations, it should create the presumption that the carrier has expressly disavowed any agreement as to the kind and quality of the goods received and the loading thereof, and the claimant should be required to prove, by other evidence, the quantity and condition of the goods and that they were properly loaded.

R. Sigmon, Millers Law of Freight Loss and Damage Claims, 99-117 at 285 (4th Ed. 1974) (emphasis in original). Were portions of the Evansville-Springfield cargo damaged or lost, the absence of the SL&C notation

would have required the carrier to overcome the presumption that it was responsible for the problem.[5]

But no claim for damage or loss was filed here and, hence, the Commission concluded that "[u]nder these circumstances, the notation would serve no purpose" (ICC op. at 6). The Commission found that the case was controlled by *Iowa Beef Processors, Inc. v. Western Transportation Company*, I.C.C. No. 37521F (September 14, 1981), and held:

> Zenith has complied substantially with the tariff requirements. Zenith loaded, counted and unloaded each shipment in fact, and the evidence is not disputed that it is the general practice with these commodities for the shipper to do so. Accordingly, shipper and carrier each received the benefit for which it bargained. The shipper obtained service at what it considered an affordable price, and the carrier obtained needed traffic. The rate reflected the fact that Zenith relieved Orscheln of loading, counting, and unloading duties. Under these circumstances, the notation would serve no purpose, and requiring it in order for Zenith to receive the rate would be unreasonable.

Plaintiffs maintain that "[o]ne is concerned here with *risk* and not claims," that because the shipper failed to

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[5] This is exactly the point made by Commissioner Simmons, dissenting in Von Hoffman Press, Inc. v. Orscheln Brothers Truck Lines, Inc., Barry S. Schermer, Trustee, MC-C-30014 (Dec. 2, 1987) at 6. He goes one step further, however, and argues that "the fact that no evidence of claims or additional insurance has been presented in this particular case is not relevant to the reasonableness of the requirement based on industry practice." *Id.* With this we disagree for the reasons stated *infra* and enunciated by the majority decision in *Von Hoffman* at 5 ("The long established precedent holds that a notation requirement is acceptable only if shown to have a reasonable purpose. *In this case* none has been demonstrated") (emphasis added).

supply the SL&C notation the carrier bore the risk of loss (pl.mem. of law in sup. of mo. for sum.jdgmt. at 10 (emphasis in original)). We fail to see any reason to be concerned with such risk, given plaintiffs' admission that no additional insurance was purchased. We also fail to see why plaintiffs were saddled with any risk other than the remote possibility that they might not be able to prove that Zenith did the loading and unloading. As in the Commission litigation, both sides herein agree that Zenith actually performed the loading and the unloading (resp.stmt. of mat.facts at ¶ 43). Since Zenith concedes it loaded and unloaded, the presumption that the carrier is liable in the absence of the notation is irrelevant. The notation requirement is unreasonable because its only purpose has been to trap an unwary shipper. *See Standard Brands, Inc. v. Central R. Co. of N.J.*, 350 I.C.C. 555, 558-59 (1974) (holding the endorsement requirement an unreasonable "trap for the unsuspecting shipper" because it "had no bearing on the nature of the commodity being shipped or the service performed and the carriers performed no additional services because of the absence of this endorsement").

In other instances it is conceivable that a shipper in Zenith's position might try to deny its handling of the shipment, were it to lodge a claim. To do so, however, it would need to (1) forfeit its rights to the lower tariff rate; (2) overcome the presumption that it followed industry custom and explain why it deviated from it; and (3) commit perjury while trying to convince the trier of fact of a lie. That being the only scenario under which risk would be relevant in the absence of an insurance purchase, we find the Commission's conclusion that the notation requirement is unreasonable supported by substantial evidence. And given that all agree that Zenith did the loading and unloading, and that no claim was filed, the notation requirement herein was not called into play

and could thus be characterized as "entirely pointless" within the meaning of *Western Transportation.*[6]

We agree with the respondents that *Winthrop Laboratories Division of Sterlin Drug, Inc. v. Dorn's Transportation, Inc.*, 325 I.C.C. 654 (1964) is inapposite. The Commission in *Winthrop Labs* evaluated the carrier's failure to notify the shipper of lower released-value rates and refused to consider it an unreasonable practice. Because both rates were "clearly and fairly published in the tariff" the shipper was charged with knowledge of the lower rate and therefore the carrier's failure to notify was not an unreasonable practice. 325 I.C.C. at 656-57. Plaintiffs invoke *Winthrop Labs* to buttress their claim that even in the absence of a loss or damage claim the higher rate should be enforced because the carrier assumed unlimited liability during the transportation. The notation here, however, merely establishes a rebuttable presumption while the "released" rate categorically releases the carrier from liability. Thus, even if the shipper in *Winthrop Labs* had loaded and unloaded the cargo, as did Zenith, the carrier would nonetheless have been liable. As we describe above, the SL&C notation, and its absence, establish only presumptions, the latter of which was easily overcome here.

B. *Commission Decision Not Contrary to Law*

Plaintiffs contend that the use of industry custom to determine whether the background circumstances render the notation requirement unreasonable is contrary to law.

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[6] In holding the use of industry custom as relevant to the reasonableness inquiry, we believe that the procedural effect of the SL&C notation—to distribute the burdens of proof in damage or loss claims—can be accomplished through other means. Where the industry custom is for the shipper to count and load, the burden is on the carrier to demonstrate otherwise in the particular instance. This saddles the carrier with the same burden created by the SL&C notation.

They suggest that the use of industry custom to "vary the terms of a tariff" is in tension with the long-established "filed rate doctrine" which courts employ to enforce the antidiscrimination goal of the original Interstate Commerce Act. But use of industry custom does nothing to vary tariff terms and, because it will not foster discrimination, does not run afoul of the filed rate doctrine. To come to this conclusion, we look into the original basis for the doctrine.

The Interstate Commerce Act's antidiscrimination purpose was codified in 49 U.S.C. § 10761(a):

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff. . . .

The Supreme Court has enforced this provision through the filed rate doctrine, holding that "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rigid rule has been applied even in instances where the shipper relies on a carrier's misrepresentations that a particular rate, as distinguished from the filed tariff, is applicable. *See, e.g., id.* at 97 ("Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed").

Plaintiffs urge this court to apply the filed rate doctrine to the Evansville-Springfield shipments. They argue that the bill of lading notation is a condition precedent to the application of Tariff 125-H and that, in the absence of the SL&C notation, the filed rate doctrine com-

pels the higher rate be applied. The Commission instead held that "[b]ecause the notation requirement itself is unreasonable under 49 U.S.C. 10101(a), further discussion of the filed rate doctrine and equitable defenses is unnecessary" (ICC op. at 7).

1. *Tariffs Can Be Unreasonable as Applied*

The Commission's decision did not state that the notation requirement was categorically unreasonable—its ruling was considerably more narrow. It only held that in those circumstances where the notation "would serve no purpose" (ICC op. at 6), it would be unreasonable to consider the notation requirement a condition precedent to the tariff's application. Thus the collection of undercharges, based on the higher rate, would be an unreasonable practice given the circumstances at bar.

No one contends that the Commission cannot make general pronouncements as to the reasonableness of particular rates or practices outlined in tariffs. For example, it could and often does declare a certain tariff unreasonable because of ambiguity. Plaintiffs contend that because the Commission's decision only decided the reasonableness of the notation requirement given the circumstances here, the filed rate doctrine compels the collection of undercharges—that unless all provisions of Tariff 125-H are met the higher rate must apply. They look to *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 778 F.2d 1365 (9th Cir. 1985), for support.

In *Farley*, the Ninth Circuit upheld the district court's holding that referral to the Commission was unnecessary where the referring party admitted that the tariff was unambiguous and reasonable on its face (*id.* at 1371). Although here the Commission has issued an advisory opinion, this court is no less capable of rendering the same type of legal decision made by the Farley district court. We are guided by the Seventh Circuit's decision in *Western Transportation Co., supra.* The court there held

that while the tariff at issue was unambiguous, the plaintiff could still challenge the reasonableness of the tariff's notation requirement before the Commission. 682 F.2d at 1232. The court suggested that the plaintiff ask the Commission to declare the notation requirement unreasonable, as it did for Iowa Beef Processors, Inc. in a prior dispute (*id.* at 1231). What is notable is that the Commission's decision in *Iowa Beef Processors, Inc. v. Western Transportation Co.*, ICC Docket No. 32521F (Sept. 14, 1981), did not declare the notation requirement unreasonable on its face, but instead found that the particular facts rendered the notation requirement unreasonable as applied:

> As to the reasonableness of the endorsement requirement, we agree with the conclusions reached by the ALJ. The *Standard Brands* principle applies here. There the Commission held that a shipper is bound by such a provision, but found on the particular facts that to apply such a provision would be unreasonable.
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> * * * *
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> Since the consignor loading and consignee unloading is the norm in transporting the involved meats, application of a bill of lading endorsement requirement to rates for such products is unwarranted. Thus, applying the *Standard Brands* principle here is entirely proper.

Id. at 3.[7] So the law in this circuit permits the Commission to declare a particular tariff or tariff provision un-

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[7] The Seventh Circuit's invocation of *Iowa Beef* is strong evidence that the Ninth Circuit's *Farley* decision inadequately distinguished *Western Transportation*. In *Farley* the court held that "[i]n that case [*Western Transportation*], there is no indication that the court or Wilson considered the tariff to be reasonable on its face. In fact, the opposite is true; the court suggested that Wilson challenge the reasonableness of the tariff's notation requirement, and we interpret the opinion's 'as applied' language in that

reasonable, as applied to the circumstances of the case. *See also Carriers Traffic Service v. Anderson Clayton & Company, et al.*, 691 F.Supp. 151 (N.D. Ill. 1988) (upholding the Commission's determination that application of a higher rate would be unreasonable given the circumstances); *Inman Freight Systems v. Boise Cascade Corporation, et al.*, 691 F.Supp. 146 (N.D. Ill. 1988) (same).

Furthermore, we look to the original purpose of the filed rate doctrine to prevent wooden application of it:

> This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Maxwell, 237 U.S. at 97; *see also Armour Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908) ("If the rates [filed and published as required by law] are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart"). Thus the unreasonable practice jurisdiction of the Commission is limited by the filed rate doctrine only where the Commission's holding would foster discrimination—the evil addressed by both the doctrine and the Act. Were such a showing made, the Commission would not be able to contend that "[b]ecause the notation requirement itself is unreasonable under 49 U.S.C. 1070(a), further discussion of the filed rate doctrine and equitable defenses is unnecessary" (ICC op. at 7). Instead, this court would be duty-bound to reverse the Commission's determination.

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context." 778 F.2d at 1371. We believe that the "as applied" language should be interpreted in the context of *Iowa Beef*, the rationale therein being that the reasonableness of the notation requirement should be evaluated in light of the circumstances pursuant to *Standard Brands*.

With regard to the notation requirement, however, we fail to see how reviewing who actually performed the loading and unloading would either be contrary precedent or foster the type of discrimination to which the Interstate Commerce Act was addressed.

2. *Use of Industry Custom Not Contrary to Law*

Plaintiffs invoke *Atlantic Coast Line R. Co. v. Clinchfield Fuel Co.*, 94 F.Supp. 992 (W.D.S.C. 1951), for the proposition that "it has long been held that 'custom' is not admissible to vary the terms of a tariff" (pl.mem. at 16). We find that contention without merit. First, *Atlantic Coast* refers not to industrywide custom, but rather to the course of dealings between the parties. The latter is manipulable by the carrier and shipper, but the former is not. Second, including industry custom among the circumstances reviewable by the Commission in ascertaining whether awarding particular undercharges would constitute an unreasonable practice is different from "varying the tariff." The Commission's power to review the reasonableness of practices derives from 49 U.S.C. § 10701(a), not from the antidiscrimination powers enunciated in § 10761(a). The Commission's power to interpret its unreasonable practice jurisdiction is limited only in those instances in which the interpretation runs afoul of the Act itself. Thus, as is explained *infra*, the Commission's use of custom is contrary to law only where it can be demonstrated that discrimination would be fostered.

Plaintiffs do attempt to make such a demonstration. They argue that the lower rate is made possible only by the notation requirement's shifting of the burden of proof in claim proceedings. Thus, if "custom" is considered relevant, shippers who customarily load and count will receive the benefits of the lower rate even without the requisite notation, while others for whom loading and counting is unusual will not receive the lower rate without considerable additional proof. We find this analysis unpersuasive.

First, this is not the form of discrimination to which the Act was addressed. The Act attempted to achieve uniformity in freight transportation charges in an effort to eliminate the discrimination and favoritism that plagued the late 19th century railroad industry. *See So. Pacific Trans. Co. v. Commercial Metals Co.*, 456 U.S. 336, 354-44 (1982).[8] "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination." *New Haven R.R. v. I.C.C.*, 200 U.S. 361, 391 (1906). "Among other things that Congress was concerned with . . . was the 'evil' of big shippers getting secret discounts from railroads." *Western Transportation*, 682 F.2d at 1230 (citations omitted). The scenario foreshadowed by the plaintiffs contemplates the benefitting of particular shippers, not based on their size or relationship with the carrier but, rather, based upon their chosen method of allocating the responsibility during shipping. This is a far cry from the evil contemplated by the Act—the favoritism showed large shippers by carriers who discriminated against smaller shippers by not offering them comparable rates for identical services.

Second, plaintiffs seem to be confusing "industry custom" with "course of dealing." The former is unalterable

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[8] *See also* Delta Traffic Service, Inc. v. Georgia-Pacific Corporation, 684 F.Supp. 769, 770 (D. Conn. 1987) ("The reason for this rule was Congress' desire to eliminate secret discounts and preferential treatment for big shippers"); Oneida Motor Freight, Inc., et al. v. Felsway Corporation, Adversary No. 85-03606 at 10 (Bankr. D. N.J. Oct. 10, 1987) ("It is the prevention of collusion between a shipper and a carrier and the prevention of the creation of secret rates which are against the public interest that is the underlying principle behind the case law that preserves the sanctity of the published tariff").

by individual market participants, the latter manipulable by the parties. The scenario envisioned by the plaintiffs concludes that a particular "group of shippers (those who do not customarily load and count their own freight but will do so in consideration of a lower rate) will not be able to take advantage of the lower rate unless they notate the applicable bills of lading" (pl.mem. at 18). But the policies of any individual or group of shippers are irrelevant; industry custom alone—and there will be by definition only one—supplies the appropriate presumption. With full knowledge of the custom any individual shipper, no matter its size, can avail itself of the benefits and protections afforded thereby. Here shippers will be the beneficiaries of a presumption that, in conformity with industry custom, they loaded and unloaded. An individual shipper may, if it prefers, seek to conduct business in a manner contrary to the industrywide custom, but since conformity and non-conformity with industry custom is available to all shippers, we find no discriminatory effect from including custom in the set of circumstances to be reviewed in ascertaining whether the notation requirement is reasonable.

Finally, both rates at issue are published and are therefore available to small and large shippers—the dispute is over which of two published tariffs is applicable to the 1981-83 shipments between Evansville and Springfield. Zenith contends that the applicable rates were contained in MWB 226-D, Item 10090. Orscheln argues that Zenith's failure to make the appropriate notation on the bill of lading renders the above tariff inapplicable and that a higher class rate applies. Since both rates are contained in published tariffs the Commission's consideration of industry custom does nothing to deprive either large or small shippers from using published rates.

In the absence of persuasive evidence that discrimination will be fostered by including industry custom in the

circumstances reviewable by the Commission, we hold that the Commission's interpretation of its unreasonable practice jurisdiction is not contrary to law.

II. Negotiated Rates

We turn now to the legal relevance of negotiated but unfiled rates. As previously described, the dispute in this case concerns the bounds of the Commission's unreasonable practice jurisdiction. One court has described the judicial role as follows:

> The court is therefore required to determine the extent to which the filed rate doctrine is modified by the defense that collection of the undercharge would be an unreasonable practice within the meaning of 49 U.S.C. § 10701(a).

In Re Total Transportation, Inc., 84 B.R. 590 (D. Minn. 1988).[9] We, however, are willing to look beyond merely the letter of the filed rate doctrine's prohibition of equitable defenses. Instead, as done *supra* with respect to the notation requirement, we evaluate whether the Commission's decision will foster discrimination.[10]

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[9] The *In Re Total Transportation, Inc.* decision was admittedly at a different stage of the litigation than this case. The court therein decided that referral to the Commission under the doctrine of primary jurisdiction was inappropriate because the tension between the use of negotiated rates and the filed rate doctrine is a legal, not factual, dispute. "It is enough for the court to note that because it is bound by both statute and Supreme Court precedent to apply the filed rate doctrine it would be unable to accept any advisory opinion by the ICC that a shipper be permitted to avoid the filed rate doctrine through assertion of equitable defenses." *Id.* at 598. But the reasoning employed therein is equally applicable to the question of whether the Commission's use of negotiated rates in the case at bar was contrary to law.

[10] Just as we are unwilling to apply the filed rate doctrine without question to supersede the Commission's unreasonable practice jurisdiction, we similarly refuse to dismiss those cases merely because they "all antedate the Commission's policy statement in *Nego-*

A. *The ICC's Opinion and MC-177*

As recently as 1985 the Commission refused to interpret its unreasonable practice jurisdiction in ways that would allow the assertion of a negotiated but unfiled rate as a defense to a suit for undercharges. *See Atlas Foundry and Machine Co. v. IML Freight, Inc.*, ICC Docket No. MCC-10942 (May 16, 1985), *cited in* Goodman, *Unfiled Motor Common Carrier Rates Gain New Respectability as the ICC Celebrates its Centennial* ("*Unfiled Rates*"), 54 Transp.Pract.J. 292, 302 (1987). In 1986, however, the Commission reversed its course. In *National Industrial Transportation League—Petition to Institute Rate-making on Negotiated Motor Common Carrier Rates: Ex Parte No. MC-177*, 3 I.C.C. 2d 99 (1986) ("MC-177"), the Commission announced that it would in some circumstances employ its unreasonable practice jurisdiction under 42 U.S.C. § 10701(a) to reduce the ability of carriers to bring suits for undercharges. In MC-177 the Commission contended that the Motor Carrier Act of 1980, Pub.L.No. 96-296, 94 Stat. 793, "dramatically altered the competitive atmosphere or the motor carrier industry." 3 I.C.C.2d at 105. The Commission attributed the dramatic increase in the use of negotiated but unfiled rates to the deregulation of many entry and expansion restrictions by the Motor Carrier Act. *Id.* The Commission noted that "hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file." *Id.*

Thus the Commission announced that it would issue advisory opinions to courts from whom cases were re-

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tiated Rates [MC-177] and simply do not address the ICC's 'reasonable practice jurisdiction.'" (Mem. in sup. of resp. cross-mo. for sum. jdgmt. at 18.) We instead look to the evil to which the filed rate doctrine is addressed and ascertain whether the Commission's invocation of its unreasonable practice jurisdiction would frustrate the doctrine's goals given the particular circumstances.

ferred. In those opinions the Commission would evaluate the circumstances to determine whether the shipper should be entitled to assert the negotiated rate as an equitable defense to a claim for the collection of undercharges:

> We would, at a court's request, determine, based on all relevant circumstances, whether the collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect.

3 I.C.C. 2d at 107. The Commission outlined the criteria under which it would enforce the unfiled negotiated rate:

> A decision in favor of the shipper under the *Negotiated Rates* precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote.

(ICC op. at 8.)

The Commission found both that Orscheln's senior officials negotiated two sets of rates below the filed tariff rate, and also that there was sufficient "evidence of an offer, mutual acceptance by the practices, performance and payment of consideration" (ICC op. at 9). Therefore, as to the 20 shipments of finished products paid for at the negotiated rate, the Commission held that "it would be an unreasonable practice to allow respondent to collect the undercharges based on the tariff rate." *Id.* The Commission then turned to the remaining 51 shipments of television cabinets from Evansville to Springfield, billed and paid at the rate specified in a tariff not yet effective at the time of transportation. The Commission found that Orscheln's billing at the subsequently

filed rate and petitioner's payment of those charges was strong evidence that the rate in question was actually negotiated. *Id.* Orscheln's mere denial of Zenith's explanation was insufficiently credible to deny that the rate had been agreed upon and that Zenith had good reason to believe the rate was actually filed. *Id.* The conclusion with regard to the television cabinet shipments was that "[i]t would be an unreasonable practice for respondent to collect the tariff rate for the shipments based upon the mutually negotiated reduction in rates entered into between petitioner and two senior Orscheln officials." *Id.* at 10.

B. *ICC's Opinion Contrary to Law*

Succinctly stated, the issue here is whether the application of MC-177 to the circumstances here is contrary to the terms and goals of the Interstate Commerce Act as protected by the filed rate doctrine.[11] We find that MC-177 is fundamentally flawed in that it can foster discrimination both by removing the incentive of shippers to ascertain whether the negotiated rate has been filed and also by inducing carriers to be less vigilant in filing the rate with the Commission. Thus the Commis-

[11] We take this opportunity to describe the various procedural postures from which district courts have evaluated the Commission's authority. The majority of cases have discussed MC-177 when deciding whether to refer to the Commission's determination as to the reasonableness of undercharge collection. The logic of these cases is relevant because they consider the same legal issues we are deciding here—whether the Commission's advisory opinion, if it held that the collection of undercharges would be unreasonable, would be contrary to law. If the courts so conclude, they don't bother asking the Commission's opinion and instead usually grant summary judgment for the plaintiffs. Other courts have waited until after the Commission issues its opinion to evaluate whether its conclusions are contrary to law. Those cases look at the analysis provided by the Commission in the particular case. We invited the Commission to furnish us with analysis specifically applicable to the case here. Now we decide whether those conclusions are supported by substantial evidence and/or contrary to law.

sion's interpretation of its unreasonable practice jurisdiction is contrary to law because that interpretation conflicts with the purpose of the Act.

As previously described, MC-177 requires only (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote. In this case the Commission's factual findings—which answer these queries—are supported by substantial evidence,[12] but we inquire further into the effects of MC-177.

The problem is that MC-177 effectively removes the shipper's obligation to ascertain whether the negotiated rate was actually filed. It is settled law that this obligation derives directly from 10761(a)'s requirement that all rates charged must be pursuant to a filed rate which cannot be changed without Commission approval.

The Commission has contended that MC-177 does not remove the carrier's legal obligation to file the rate with the Commission, nor the shipper's obligation to ascertain whether the rate was actually filed. But MC-177 removes the teeth from these requirements. For example, the in-

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[12] In light of the conflicting case law on MC-177, we take this opportunity to find that the Commission's factual findings *re* the negotiated rates were supported by substantial evidence. With respect to the 20 shipments of finished products, Orscheln did not contest Zenith's showing that the $4.25 per cwt rate was negotiated and agreed upon. And with rsepect to the 51 shipments of television cabinets, substantial evidence supports the ICC's finding that the rate was negotiated and relied upon. Zenith's evidence from a former employee named specific senior officials of Orscheln, dates and locations of the alleged negotiations. And it is undisputed that Orscheln billed petitioner at the subsequently-filed rate. The Commission's ruling that Orscheln's mere denials, without additional evidence in general or from the named senior officials in particular, were less credible than Zenith's demonstrations surely was supported by substantial evidence.

ability of a shipper to enforce agreements that contravene the filed rate serves as "a deterrent weapon in the enforcement of the statute and the public policy which underlies it." *Bowser & Campbell v. Knox Glass, Inc.*, 309 F.2d 193 (3d Cir. 1968), *cert. denied*, 392 U.S. 907, *quoted in Unfiled Rates* at 295. Leonard S. Goodman, former associate general counsel to the Commission and author of *Unfiled Rates*, keenly observes that "as a practical matter, from the standpoint of the shipper, the size of the undercharge will increase more or less in proportion to the size of the shipper, so that the shipper can readily weigh the cost of checking for a filed tariff against the risk of paying the undercharge." *Unfiled Rates* at 299. MC-177, by reducing the risk of paying the undercharge, removes the incentive for larger shippers to check for the filing of the negotiated tariff.

Knowing that to be the case, and also in an effort to maintain a higher rate for shipments from other shippers, the carrier may be lax in actually filing. "Enforcing the agreed rate over the published rate undermines the strong antidiscriminatory policy of the statute that requires the common carrier to follow the tariff-filing steps prior to engaging in the transportation service." *Id.* The otherwise strict adherence to the filed rate doctrine has been softened only after courts have concluded that discrimination would not be promoted. *See, e.g., Iowa Power and Light Co. v. United States*, 712 F.2d 1292, 1295 (8th Cir. 1983), *cert. denied*, 466 U.S. 949 (1984) ("it is clear that the Commission's action in the present circumstances does not conflict with that [the antidiscrimination] underlying purpose").[13]

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[13] We wonder about the United States' contention that "Petitioners' 'policy' would discriminate among shippers based upon their care and prudence in reading rate tariffs and choosing carriers upon which to rely" (res.mem. at 20). Put another way, the policy to which the government objects would discriminate in favor of shippers who use care and prudence in following the law. That policy is at the core of the Act. It is peculiar that the United

Unfortunately, we are unable to glean from existing case law a consistent theory because prior judicial treatment of the conflict between the filed rate doctrine and MC-177 has been inconsistent. The Supreme Court has no on-point pronouncements, and among the courts of appeals only the Eleventh Circuit has closely analyzed the issue. In *Seaboard System R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), the court affirmed the Commission's refusal to enforce a railroad's tariff rate in circumstances where the shipper had relied on the carrier's representation that a significantly lower rate would legally apply. In particular, the court held that the Commission was able to prohibit the collection of undercharges pursuant to its unreasonable practice jurisdiction. 794 F.2d at 638. This decision, unfortunately, is much less helpful than it would first appear. The tariff at issue in *Seaboard System* was one "whose meaning is not plain to the ordinary user." *Id.* at 637. This ambiguity is relevant insofar as it goes directly to the shipper's ability to fulfill his obligation to ascertain whether the rate billed was actually filed. Here Zenith does not allege any tariff ambiguity. *See also Delta Traffic Service, Inc. v. Georgia-Pacific Corporation*, 684 F.Supp. at 711 ("The case at bar, of course, does not involve a confusing tariff"). In such circumstances we cannot excuse the shipper's failure to perform its legal obligation because doing so would remove an important legal weapon ensuring that the antidiscrimination purpose of filing rates is achieved. Secondly, *Seaboard System* received a Commission order issued as a result of an administrative complaint filed by the shipper with the Commission. The court therefore decided only that the Commission had authority to permit equitable defenses in administrative complaint proceedings. Here, however, the Commission's

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States would marshall this analysis in the midst of an otherwise thoughtful argument.

review is pursuant to a referral from a district court. Finally, we are concerned that the Eleventh Circuit did not reconcile the tension between the Commission's unreasonable practice jurisdiction and the antidiscrimination focus of the Interstate Commerce Act. *Seabaord System* merely deferred to the Commission's determination that the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the older remote possibility of intentional misquotes. That conclusion is legally irrelevant. There is no statutory or common law basis for what the court seems to regard as the shipper's "right" to rely on the carrier's representations. We find it problematic, therefore, that the Eleventh Circuit was willing to acquiesce to the Commission's subordination of the Act's principal focus to the convenience of shippers. To the extent that our holding is inconsistent with *Seaboard System*, we respectfully disagree.

The Seventh Circuit has addressed the issue only tangentially in *Western Transportation Company, supra.* The court therein firmly endorsed the filed rate doctrine, in full recognition of the harsh consequences which inevitably result. The court held the tariff, which contained a load and unload notation requirement, to be unambiguous and that therefore the suit for undercharges was appropriate. *Id.* at 1231. But the court permitted the shipper thereafter to plead that the notation requirement was unreasonable as applied to the circumstances. *Id.* at 1232. By suggesting this alternative and favorably invoking the Commission's holding that a similar notation requirement was unreasonable in *Iowa Beef Processors, Inc., supra,* the Seventh Circuit's decision might be interpreted to imply that MCC-177 is consistent with the Interstate Commerce Act. But since that court has not addressed the issue directly, and because we feel that the tension is a very real concern heretofore only vaguely discussed, this court does not feel bound to follow what was only insinuated.

Bankruptcy and district courts have split on the issue of whether MC-177 is contrary to law. Some courts, believing MC-177 consistent with the filed rate doctrine because it does not alter the legal requirement that the rate be filed, have referred cases to the Commission. See, *e.g.*, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, No. 85-0021-CV-W-JWO (W.D. Mo. 1988) at 11 ("the ICC's change in policy and consideration of equitable defenses in the instant case was justified and consistent with its 'practices' jurisdiction under the Interstate Commerce Act"); *In Re Tucker Freight Lines, Inc.*, 85 B.R. 436, 429 (W.D. Mich. 1988) ("it appears to this Court that the ICC does indeed have authority to determine whether collection of undercharges would be an unreasonable practice"); *Younger Transportation, Inc. v. TMBR Drilling, Inc.*, MO-85-CA-20 (W.D. Tex., Sept. 23, 1987) at 5 ("It is not a reasonable practice for defendant Younger to collect the tariff base rate other than the negotiated rate for the shipment described in this proceeding"); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores*, 670 F.Supp. 644, 649 (W.D.N.C. 1987) ("it is clear, however, that this court, without the administrative advice of the ICC, cannot in this undercharge case entertain any equitable defenses"); *Christian v. Caterpillar, Inc.*, 74 B.R. 373, 377 (Bankr. C.D. Ill. 1987) (trustee's undercharge claims "are at the heart of the ICC's authority and, in the interest of uniformity should be initially heard by the ICC"); *Breman's Express Co. v. H & H Distribution Co.*, 69 B.R. 356, 359 (Bankr. W.D. Pa. 1987) ("the issue presented before us must first be referred to the ICC, so that we might be aided in our final determination by that agency's special competence and expertise").[14]

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[14] In footnote 13 of their memorandum respondents invoke INF, Ltd. v. Spectro Allows Corp., 651 F.Supp. 1405 (D. Minn. 1987), for the proposition that "[p]roper concern for 'promoting proper relationships between the courts and administrative agencies leads to the conclusion that this litigation should be stayed so that the

Others have refused referral or otherwise declared MC-177 contrary to law because they considered it merely another attempt to permit equitable defenses in violation of the filed rate doctrine. *See, e.g., Motor Carrier Audit & Collection Co. v. Baldor Electric Company*, CA3-85-2002-AH (N.D. Tex. July 27, 1988) at 12-13 ("the fact that Congress in the Motor Carrier Act of 1980 established a new policy to promote a competitive and efficient motor carrier industry . . . is insufficient to overturn long standing Supreme Court construction of the 'filed rate' doctrine"); *Delta Traffic Service, Inc. v. E.L. Mustee & Sons*, Civil Action No. C87-1726 (N.D. Ohio, May 12, 1988) ("until Congress or at least the Sixth Circuit decides differently, the Court has no choice but to enforce the published tariffs, at least where no ambiguity exists. Therefore, referral to the ICC would be a pointless exercise"); *In re Total Transportation, Inc.*, 84 B.R. at 598 ("because it is bound by both statute and Supreme Court precedent to apply the filed rate doctrine it would be unable to accept any advisory opinion by the ICC"); *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Georgia-Pacific Corporation*, 684 F.Supp. at 771 ("holding referral inappropriate because '[t]he Court is simply not persuaded that the general requirement of maintaining reasonable practices can contravene the specific requirement that rates must be filed and that no deviations are permitted from those rates'"); *Feldspar Trucking Company, Inc. v. Greater Atlanta Shippers Association, Inc.*, 683 F.Supp. 1375, 1377 (N.D. Ga. 1987) (denying referral to the ICC because "[t]he tariff is unambiguous and may be applied without the aid of the ICC's expertise"), *interlocutory appeal denied*, 849 F.2d 1389 (11th Cir. 1988); *Motor Carrier Audit & Collection Co. v. United Food Service, Inc.*, Civil Action No. 87-C-

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ICC may determine whether [plaintiff's] action is unreasonable." *Id.* at 1407. Subsequently, however, in INF, Ltd. v. Spectro Alloys Corp., 690 F.Supp. 808, 810 (D. Minn. 1988), the court rejected the Commission's split decision in favor of the filed rate doctrine.

2898 (D. Colo. May 4, 1987) at 4 (refusing to apply the primary jurisdiction doctrine because of "clear precedent establishing that equitable defenses are not generally available"). *See also Yaquinto v. Supreme Beef Processors, Inc.*, Civil Action No. 3-87-2274-R (N.D. Tex. Jan. 20, 1988); *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Cuisinarts, Inc.*, Civil Action No. H-87-424 (D. Conn. Oct. 28, 1987); *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Personality Plastics, Inc.*, Civil Action No. CV-87-2323 (E.D.N.Y. Oct. 7, 1987); *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Keystone Lighting Corporation*, Civil Action No. 87-3659 (E.D. Pa. Sept. 24, 1987); *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Occidental Chemical Corporation*, Civil Action No. 87-4217 (E.D. Pa. August 18, 1987); *In re Taynton Freight Systems*, 76 B.R. 971 (Bankr. M.D. Pa. 1987); *West Coast Truck Lines, Inc. v. Kaiser Aluminum & Chem. Co.*, No. C-87-0048 (N.D. Cal. July 28, 1987); *Transportation International Inc. v. Douglas 7 Lomason Company*, No. 86-CV-73996-DT (E.D. Mich. July 9, 1987); *Cooper v. California Consolidated Enterprises, Inc.*, Adversary Proceeding No. 86-0498 (Bankr. W.D.N.C. March 25, 1987).

This is true of certain decisions within this jurisdiction. *See Motor Carrier Audit & Collection Co. v. Portion Packaging, Inc.*, 683 F.Supp. 202, 203 (N.D. Ill. 1988) (Bua, J) ("In light of the filed rate doctrine, referral of this case to the ICC would serve no purpose"); *see also Motor Carrier Audit and Collection Co. v. Medline Industries, Inc.*, Civil Action No. 87-C-6123 (N.D. Ill. Nov. 2, 1987) (Zagel, J.,); *Motor Carrier Audit and Collection Co. v. Casion*, Civil Action No. 87 C 6124 (N.D. Ill. Oct. 27, 1987) (Aspen, J.).

2. *Motor Carrier Act of 1980*

We also take issue with the Commission's use of the Motor Carrier Act of 1980 ("MCA") to justify MC-177. The Commission therein held that

> [t]he MCA dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competiton. Thousands of carriers have entered the market with broad operating authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice if they are to retain existing traffic or quickly obtain new (including backhaul) traffic.

MC-177, 3 I.C.C. 2d at 105. The MCA is not, however, sufficient legal justification for reinterpreting the ICC's unreasonable practice jurisdiction in a way which undercuts the antidiscrimination purpose of the Act.

In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court reviewed the effect of the Motor Carrier Act of 1980 on the filed rate doctrine. The Court held that the holding of *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), that a private shipper could not recover treble damages under § 7 of the Sherman Act in connection with ICC-filed tariffs, survived both the Reed-Bulwinkle Act and the Motor Carrier Act. *Id.* at 419-20. The *Square D* court recognized that *Keogh* might be inconsistent with the 1980 Act and that overruling it would in fact promote the pro-competitive goals of the Act. Nonetheless, the Court concluded it was powerless to act:

> We may assume . . . that the *Keogh* decision was unwise as a matter of policy—but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the stautory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1960. Petitioners have pointed to no specific statu-

> tory provision or legislative history indicating a specific congressional intention to overturn the long-standing *Keogh* construction; harmony with the general legislative purpose is inadequate for that formidable task.

476 U.S. at 420 (footnote omitted). We think this conclusion is equally applicable to MC-177's treatment of the 1980 Act; mere consistency with its purpose is insufficient justification for altering settled law.

It is notable that Congress did visit the question of tariff reasonableness in the 1980 Act. The Act restricted the ability of the Commission to declare certain rates unreasonable by creating a "zone of rate freedom" for rates which fall within a specified percentage range of statutory points of reference. *See* 49 U.S.C. §§ 10708(d)(1)(B), (d)(4)(B). The Act also created a presumption that rate bureau agreements meeting Commission guidelines are entitled to antitrust immunity. *See* 49 U.S.C. § 10706(b)(2). "However, despite extensive provisions in the Act dealing with motor carrier rates, nowhere did Congress provide the faintest inkling that it viewed the filed rate doctrine as a regulatory anomaly which hampered competition." *In Re Total Transportation, Inc.*, 84 B.R. at 597. To the contrary, the legislative history strongly supports the proposition that antidiscrimination goals survived the Motor Carrier Act:

> The thrust of [the new zone of rate freedom subsection] is to provide for more pricing freedom and less government regulation and to balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing . . . .
>
> This new latitude carries with it less government involvement, except in the area of discriminatory and

> predatory pricing. In these two areas, the Commission's powers remain intact.

H.Rep. 96-1069, 96th Cong. 2d Sess. 12, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2282, 2307. We do not question that the Commission can "adapt [its] rules and practices to the nation's needs in a volatile changing economy." 3 I.C.C.2d at 103 n.10. But in light of our finding that MC-177 in these circumstances will foster discrimination, we think that the 1980 Act's legislative history fails to support the Commission's position. As noted in *G.M.W., Inc. v. Certified Parts Corporation*, 400 N.W.2d 512:

> The concurrence would adopt a broad rule permitting courts, in concert with the ICC, to circumvent an Act of Congress. Courts are not free to do this. The ICC as it recognizes, is also not free to do this. *Wilson* addresses the significant reasons why Congress adopted the "filed tariff" doctrine, and holds that under the unique facts of that case, the ICC could find part of a tariff unreasonable, and therefore enforceable. It is another matter altogether to suggest that any tariff can be an "unreasonable practice". Such a suggestion raises questions of separation of powers, an issue not raised or argued here.

Id. at 515.

There is ample authority to suggest that, notwithstanding the ICC's advisory opinion, this court can refuse to permit the defendants to enforce the negotiated but unfiled rate. *See, e.g., In Re Robinson Truck Lines*, 89 B.R. 584, 592 (Bankr. N.D. Miss. 1988) ("Based on a thoughtful review of the decisions rendered by the ICC in the three proceedings referred to it by this Court, this Court is of the opinion that it cannot confirm or adopt any of the decisions"); *INF, Ltd. v. Spectro Alloys Corp.*, 690 F.Supp. 808, 810 (D. Minn. 1988) ("Referral to the ICC under these circmstances allowed the record to be

developed fully by permitting the ICC to express its view on the issues in question. Nevertheless, after giving thorough consideration to the Commission's decision, the court determines that it remains bound by the 'filed rate' doctrine established by Congress and the Supreme Court"); *Motor Carrier Audit & Collection Co. v. United Food Service, Inc.*, at 4 ("While the ICC may so advise a court, it is difficult to understand how, in the light of clear precedent establishing that equitable defenses are not generally available, a court could adopt the ICC's recommendation that a defendant be allowed to assert those defenses").

CONCLUSION

The Commission itself admits that "the referring court retains the authority to set the remedy, if any, and review our determination." *MC-177*, 3 I.C.C.2d at 107. We agree with the Commission that enforcing the notation requirement, given the circumstances, would be unreasonable. We disagree, however, with its conclusion that the suit for undercharges is unreasonable because of a previously negotiated but unfiled rate.

For the foregoing reasons, we grant plaintiffs' motion for summary judgment as applied to their $43,267.67 undercharge claim for the billing of negotiated but unfiled rates. We therefore deny defendant's and respondents' motions for the same. We also deny plaintiffs' motion for summary judgment, as applied to their $67,403.48 undercharge claim for the absence of the appropriate notation. We grant defendant's and respondents' motions for summary judgment on those undercharges. We also award the plaintiffs prejudgment interest on their $43,257.67 undercharge claim.

/s/ James B. Moran
JAMES B. MORAN
Judge
United States District Court

December 8, 1988.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Case Number: 85 C 8638

ORSCHELN BROS. TRUCK LINES, INC. *et al.*

v.

ZENITH ELECTRIC CORP. *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That we grant plaintiffs' motion for summary judgment as applied to their $43,267.67 undercharge claim for the billing of negotiated but unfiled rates. We therefore deny defendant's and respondents' motions for the same. We also deny plaintiffs' motion for summary judgment, as applied to their $67,403.48 undercharge claim for the absence of the appropriate notation. We grant defendant's and respondents' motions for summary judgment on those undercharges. We also award the plaintiffs' prejudgment interest on their $43,267.67 under-

charge claim. (See Memorandum and Order dated 12-8-88)

H. STUART CUNNINGHAM
Clerk

/s/ Willie A. Haynes
WILLIE A. HAYNES
(By) Deputy Clerk

Date December 8, 1988

APPENDIX E

INTERSTATE COMMERCE COMMISSION DECISION

No. 40059

ZENITH ELECTRONICS CORPORATION—APPLICABLE TARIFFS—PETITION FOR DECLATORY ORDER

Service Date: Aug. 7, 1987

Decided: July 29, 1987

Zenith Electronics Corporation (petitioner or Zenith) seeks entry of an order determining the tariffs that were properly applicable to certain transportation provided by Orscheln Bros. Truck Lines, Inc. (Orscheln or respondent) before it filed for bankruptcy in October 1983. In September 1985, Carriers Traffic Service, Inc., and auditing firm hired by the Orscheln trustee, Barry S. Schermer, billed Zenith $175,487.69 for undercharges for a substantial number of shipments. Zenith did not pay, and Orscheln filed suit in Federal District Court.[1]

PRELIMINARY MATTER

The United States District Court dismissed the related court proceedings without prejudice pursuant to agreement of the parties, with leave to reinstate. This action

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[1] No. 85 C 08638, *Orscheln Bros. Truck Lines Company, Inc. Barry S. Schermer, Trustee* v. *Zenith Electronics Corporation f/k/a Zenith Radio Corporation*, (N.D. IL).

was taken in response to a motion filed by Zenith requesting the court to stay the balance of action pending declaration by the Commission as to the matters raised in this proceeding. We are treating this as a referral because it appears that the court intended to defer its proceedings pending an initial determination by this Commission. Thus, in now acting on Zenith's request here, it is clear that the Court has deferred to the primary jurisdiction of this Commission for determination of certain rate and practice-related issues. Ex Parte No. MC-177, *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates* (not printed), served May 12, 1987.

BACKGROUND

Zenith has filed: (1) a petition raising the issue of whether application of a bill of lading notation requirement is an unreasonable practice; and (2) a supplemental petition raising an issue of negotiated rates under our decision in *NITL—Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986). (*Negotiated Rates*). National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, Inc. (Intervenors) have filed a statement in support of Zenith's petition.

The original petition requests that the application by respondent of Tariff 125-H, Item 578, and MWB 226-D, Item 10090 to shipments of television cabinets from Evansville, IN to Springfield, MO, during the period of March 24, 1981 to August 16, 1983, be declared unreasonable and in violation of 49 U.S.C. 10701(a). The supplemental petition concerns the remaining shipments that were involved in the court case. These shipments fall into two groups, each assertedly involving movements under a mutually satisfactory reduction in rates negotiated between Orscheln and Zenith, which an Orscheln official represented to Zenith as having been filed and effective

prior to the initial movement. The first group involves shipments of television cabinets moving from Evansville to Springfield prior to February 17, 1982. Zenith contends that Orscheln represented to it that the applicable rates were contained in Supplement 105 to ICC MWB 226-D. The second group involves movements of Zenith's products from Springfield to Zenith distributors at various locations between September 29 and November 12, 1982. Zenith contends that Orscheln represented that the negotiated rates had been properly filed at the ICC as OBTL 400 Item 971 and were fully effective. In each instance, Zenith was originally billed in accordance with the negotiated rate ad timely paid Orscheln the full amount of its charges.

The notation requirement. From March 1981 to August 1983, Zenith tendered Orscheln 740 truckloads of television cabinets. These shipments moved from Evansville to Springfield. Orscheln billed and Zenith paid in accordance with rates established under Tariff MWB 226-D Item 10090. Item 10090 specifies that it applies only when the shipment is loaded into or onto the truck by the shipper and unloaded therefrom by the consignee, subject to Item 578 and 396 of Tariff ICC MWB 125-H, but not subject to Item 390 of Tariff ICC MWB 125-H.

The undercharge claim arises from the rules tariff, MWB 125. Item 578 of that tariff provides that rates subject to a requirement that consignor is to load and/or consignee is to unload the shipment are also subject to the following provisions:

> (1) At the time of shipment, the consignor must endorse on the Bill of Lading and Shipping Order the notation "Consignor load and count and/or consignee must unload" the shipment, as the case may be.
>
> . . . .
>
> (6) If the consignor fails to comply with the requirements of paragraph (1) herein . . . the rate

will not apply and rates otherwise published will be assessed.

The basis for Orscheln's claim is that not all the bills of lading contain a shipper's load, count, and unload notation. Respondent alleges that, in the absence of the notation required by Item 578, the rate in MWB 226-D, Item 10090, does not apply, and that, instead, a higher class rate applies.

Zenith avers that in all instances involving the service in question, the consignor (a subsidiary of Zenith) and consignee (Zenith) provided loading and unloading services. Zenith states that consignor loading and consignee unloading are customary in connection with transportation of television cabinets and argues that fulfillment of the requirement for an endorsement on the bill of lading would have served no useful purpose. Zenith provides the affidavit of its Superintendent of Material Control, Mr. Larry D. McCormack, who states that during the prior 9½ years, all deliveries of television cabinets received from Zenith by motor carriers, including Orscheln, have been unloaded by Zenith, in keeping with the general industry practice. Therefore, Zenith claims that application of the endorsement provision to rates for movement of its television cabinets is unwarranted and that the notation requirement included in ICC MWB 226 is unreasonable.

Petitioner's Manager of Domestic Planning and Control, Mr. Adolph J. Matelis, stated initially that he had examined all of the bills of lading and 613 of the 740 freight bills, that 337 of the bills of lading and 601 of the freight bills bear the notation "SL&C" placed thereon by Orscheln, and that taken together this shows that freight documents for 691 of the 740 shipments for which respondents are seeking to recover undercharges have the "SL&C" notation in acknowledgment of Zenith's loading, unloading, and counting activities. Mr. Matelis subsequently stated in a revised submission that his further

examination of freight documents showed that Orscheln transported cabinets as early as November 1981 and that 345 (rather than 337) of the bills of lading bear the "SL&C" notation. He also stated that on further examination he found 719 freight bills with the "SLC" notation, that only 14 of the freight bills examined do not bear the notation, and that only seven freight bills are still missing.[2]

Negotiated rates. Zenith first stated that, in addition to movements provided by Orscheln from March 1981 to August 1983 as described above, Orscheln also transported 51 truckloads of television cabinets from Evansville to Springfield from January 22 to February 17, 1982. This traffic allegedly was made available to Orscheln solely on the basis of the mutually satisfactory negotiated reduction in rates represented by an Orscheln official as having been filed as Supplement 105 to ICC MWB 226-D and fully effective prior to the initial movement of television cabinets. Later, during the period from September 29 to November 12, 1982, Orscheln handled 20 truckloads of finished products from Zenith in Springfield to Zenith distributors at various locations. Petitioner avers that this traffic was made available solely on the basis of negotiated rates represented by an official of Orscheln as properly filed as ICC OBTL 400 Item 971 and fully effective prior to the initial shipment of the goods. Zenith was billed and timely paid for the services in accordance with these allegedly negotiated rates. Zenith states that this traffic also would not have been tendered to Orscheln if not for the mutually satisfactory negotiated rate.

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[2] Respondent acknowledges that a certain number of the bills of lading at issue contain the notation "SL&C," and states that it will not pursue a claim for undercharges for these shipments. It does not specify how many shipments or the dollar amount of the claim this involves. It makes no acknowledgment regarding the freight bills.

Zenith submits the affidavits of its former Manager of Domestic Transportation Planning and Control, Mr. Robert H. Volck, who stated, originally, that in 1981 Orscheln was transporting television cabinets from Zenith's Indiana plant to its Sprinfigeld plant under a class rate tariff of $6.78 pcwt, and that Zenith discontinued Orscheln's services about December 1981 because Orscheln's rates were not competitive. In his revised statement made after he had an opportunity to review the shipping orders submitted as part of Orcheln's statement in opposition to the supplemental petition, Mr. Volck concedes that some of these shipments moved in 1981 and that his recollection as to certain dates was in error. The changes to his testimony are noted.

Mr. Volck states he met with E.J. Bender, Regional Manager for Orscheln, and Robert L. Seely, Special Representative for Orscheln, in early January 1982[3] in Mr. Volck's office in Chicago, IL to negotiate a competitive transportation rate at the request of Orscheln's representatives. Mr. Bender and Mr. Seely proposed a rate on behalf of Orscheln of $4.25 per cwt. and agreed to file and publish that rate. On or about the middle of January 1982,[4] Mr. Seely telephoned Mr. Volck and advised him that a tariff supplement to ICC MWB 226-D providing a rate of $4.25 per cwt., at 12,000 pounds minimum weight, had been filed under emergency provisions of the Commission and was in effect.[5] Based upon this representation, Orscheln became a preferred carrier for Zenith's Evansville to Springfield shipments and that from January 22[6] to February 17, 1982, Orscheln transported 51 truckloads of television cabinets from Evansville to Springfield and billed Zenith at $4.25 per cwt.

[3] October or early November 1981 in the revised testimony.

[4] November 1981 in the revised testimony.

[5] Supplement 105 to ICC MWB 226-D in the original affidavit.

[6] November 18, 1981 in the revised testimony.

plus applicable fuel surcharges, totaling $30,747.52.[7] Despite several requests by Mr. Volck, Orscheln did not furnish Mr. Volck with a copy of Supplement 105 until late February or early March 1982.

The revised testimony also indicates that Supplement 105 discloses on its face that it was issued on January 12, 1982, and became effective on February 18, 1982, contrary to Orscheln's earlier representations. Mr. Volck avers that a notation appearing on the earliest shipping orders submitted by Orscheln suggests that Orscheln's own rate clerk relied on oral instructions from a superior to rate the shipments at $4.25 on the basis of 12,000 pounds minimum weight, and confirms that from the outset of its handling of the relevant traffic Orscheln billed and collected for its services in accordance with the rate it represented to Mr. Volck as having been filed and fully effective.

Mr. Volck further states that he would not have tendered this traffic to Orscheln had he known that Supplement 105 providing the $4.25 rate was not effective.

Mr. Volck states that about the first week of September 1982, either Mr. Seely or Mr. Bender contacted him to secure outbound business from Zenith's Springfield plant to Zenith's distributors. He avers that he and either Mr. Seely or Mr. Bender proposed rates which the parties agreed upon and which the Orscheln representatives proposed to file and publish in the necessary tariff. During the latter part of September 1982, Mr. Seely telephoned Mr. Volck and advised him that ICC OBTL 400, Item 971, had been published and that the negotiated rates were in effect. Mr. Volck claims that, based upon this representation, he caused Orscheln to be

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[7] The revised testimony does not specify the number of shipments or the total charges, but since it refers to the 57 shipping orders submitted by Orscheln, it appears that 57 rather than 51 shipments may be involved here. The shipping orders are all dated on or prior to January 8, 1982.

included as a preferred carrier for the transportation of Zenith's finished products from its Springfield plant to its distributors. Finally, Mr. Volck claims that, from September 29 to November 12, 1982, Orscheln transported 20 truckloads of finished products from Springfield to Zenith's distributors, and billed Zenith at the negotiated rates to each destination, totaling $7,717.86, which Zenith paid in full.

Respondent submitted shipping orders representing the shipments of television cabinets and argues that Mr. Volck's testimony is incorrect. Respondent avers that no fraud or misconduct was ever perpetrated by any Orscheln official and therefore Mr. Volck's testimony should be given no consideration. Respondent claims that Zenith did not discontinue the services of Orscheln in December 1981 as originally stated by Mr. Volck. It states that Zenith could not have met with agents of Orscheln in early January 1982 to negotiate the rate of $4.25 because this rate was being used as early as November 18, 1981. Respondent avers that Zenith did not reinstate Orscheln on or after the middle of January 1982 because evidence in its possession demonstrates that all times relevant here Zenith never ceased doing business with Orscheln. Respondent states that two carriers, Central Transport, Inc. and Orscheln, were parties to the $4.25 rate published in Item 10090 ICC MWB 226-D. In light of this fact, respondent argues that perhaps Mr. Volck has confused the two carriers in his recollection. Therefore, respondent avers that, if any misunderstandings existed between Zenith and Orscheln, they occurred because of simple error and there never existed any intent to defraud Zenith.

In rebuttal Zenith corrects its testimony and contends that it clearly relied on the assurances by apparently responsible Orscheln officials that the parties' mutually negotiated rates had been and were effective prior to the involved movements. Further, Zenith states that respond-

ent has failed to answer its allegations concerning the 20 shipments of finished products from its Springfield plant between September 29 and November 12, 1982 and that these shipments were transported based upon a negotiated rate that was never filed. Therefore, it claims the rate paid for these 20 shipments should be upheld as the effective rate.

DISCUSSION AND CONCLUSIONS

The notation requirement. These shipments present a situation where a tariff provided a particular price if the shipper would load, count, and unload each shipment and note its doing so on the bill of lading. It is not controverted that the shipper did the loading and unloading. The carrier billed the shipper at the agreed-on rate and the shipper paid the bills. Then the carrier went bankrupt, the trustee hired a firm to audit the carrier's bills, and the auditing company uncovered a technical tariff requirement that the shipper had to note on the bill of lading "consignor load and count and/or consignee must unload" in order for the commodity rate to apply. Since the shipper allegedly had not made the notation, the trustee commenced this litigation.

Petitioner argues that the notation requirement serves no purpose, as the level of service performed by Orscheln was not affected by absence of the notation. The commodity tariff required the shipper to load, count, and unload the shipments, which it did. It merely failed to note that fact on all the bills of lading. Petitioner also contends that, since bills of lading and freight bills must contain substantially the same information, whether the "SL&C" notation appears on one document but not the other is not controlling.

Zenith also alleges that considerations of equity demand a finding that allowance of the claimed undercharges would not be reasonable. Further, petitioner states that it was the usual industry practice for ship-

pers to load and unload this kind of freight. Zenith points out that the series of shipments occurred during a period of over 2 years, and that the principal parties were satisfied and apparently considered that their respective obligations were met at the time services were rendered. Zenith therefore claims that it would be unconscionable to apply the higher class rate, since it has already borne the full costs of performing the loading, counting and unloading functions.

Respondent disputes the contention that the notation serves no useful purpose. Rather, it asserts that the notation plays a vital role in allocating the burden of proof in loss and damage litigation by establishing which party performed loading, counting, and unloading. It points to the Division 2 decision in No. MC-C-10928, *Boise Cascade Corporation* v. *Inman Freight Systems, Inc., and Jim S. Green, Trustee* (not printed), served January 17, 1986, that upheld the reasonableness of the Item 578 notation requirement based on a finding that the requirement has potentially significant liability (loss) ramifications.

In support of its undercharge claim, respondent stresses that a motor carrier operating under authority issued by this Commission may collect only the rate specified in the published tariff covering the shipments involved. 49 U.S.C. 10761(a). It contends that execution of the notation called for in Item 578 is unambiguously a condition precedent to application of the Item 10090 rate originally assessed for Orscheln's services. Because the notation was not added to the bills of lading, the commodity rate assertedly cannot apply to Zenith's television cabinet shipments.

Relying on a long line of Commission and court precedent commonly called the "filed rate doctrine," respondent argues that the applicable tariffs are considered incorporated in the contract between the shipper and the carrier, that the tariff is a legal rate between the parties that they cannot modify, and that the shipper is pre-

sumed to know the tariff rate. *Western Transportation Company* v. *Webster City Iron & Metal Co.*, 657 F.2d 116, 118 (7th Cir. 1981) (*Webster City*). Here respondent argues the tariff was published properly and incorporated a rules tariff in a clear and unambiguous manner.

Intervenors agree with petitioner that it is the custom in the electronics industry for consignors to load and consignees to unload. Thus, in their view the notation requirement served no practical purpose and its absence did not affect the transaction in any way detrimental to respondent.

Common carriers subject to the jurisdiction of the Commission must publish and file with the Commission tariffs setting out the rates and charges for their services, and cannot generally charge or receive compensation different from that specified in those tariffs. 49 U.S.C. 10761 and 10762. Here, the rate for these shipments is on file in a tariff. Therefore, for these shipments we are not dealing with the negotiated, but unpublished rate issues involved in *Negotiated Rates.* At the same time, however, rates and practices related to transportation or service provided by regulated motor carriers must be reasonable. 49 U.S.C. 10701(a). The Commission does not have authority to award reparations when a motor carrier is involved. Nevertheless, under the doctrine of primary jurisdiction, we may determine when motor carriers violate the Act, including violations of section 10701 regarding unreasonable practices. As we are exercising here our clear authority to determine the reasonableness of a carrier practice contained in a filed tariff, respondent's claims regarding the filed rate doctrine are inapposite.

The issue before us here is whether the bill of lading notation requirement is a reasonable practice. If the tariff provision is not reasonable, it violates the statute and it is the responsibility of the Commission to take appropriate action to require compliance. *Western Transportation Company* v. *Wilson and Company*, 682 F.2d 1227,

1231 (7th Cir. 1982) (*Wilson*). The Commission has determined that notation requirements are not reasonable if, under the particular circumstances, they serve no purpose except as traps for unwary shippers. *Standard Brands, Inc.* v. *Central R. Co. of N.J.*, 350 I.C.C. 555 (1974). In No. 37521, *Iowa Beef Processors, Inc.* v. *Western Transportation Company* (not printed), served October 1, 1981, the Commission explained that it will not enforce tariff provisions requiring shippers to annotate bills of lading when they are unnecessary for proper and complete performance of carrier service. The Commission found there that a load and unload notation provision was unreasonable because the general practice in transporting beef was for the shippers to load and the consignees to unload, the parties knew of the practice, and the notation requirement served no legitimate need of the carrier.

This situation is nearly identical to *Iowa Beef*. Zenith has complied substantially with the tariff requirements. Zenith loaded, counted and unloaded each shipment in fact, and the evidence is not disputed that it is the general practice with these commodities for the shipper to do so. Accordingly, shipper and carrier each received the benefit for which it bargained. The shipper obtained service at what it considered an affordable price, and the carrier obtained needed traffic. The rate reflected the fact that Zenith relieved Orscheln of loading, counting, and unloading duties. Under these circumstances, the notation would serve no purpose, and requiring it in order for Zenith to receive the rate would be unreasonable. The carrier's case has no merit.[8]

On the issue that the notation was required to shift the burden of proof to the shipper if a loss and damage

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[8] This case differs from *Boise Cascade*. There, we could not find the notation requirement unreasonable because there was no evidence as to industry practice regarding counting and loading or as to liability matters. Here, the evidence is clear that the industry practice is for the shipper to count and load.

claim was filed, respondent has presented no evidence of a claim being filed or additional insurance being obtained by Orscheln because the notation was not made. Moreover, Orscheln received one of the major benefits behind the intent of the tariff according to Zenith. That is, its drivers did not stay with the trailer while it was being loaded and unloaded and thereby relieved Orscheln of the burden and expense of loading and unloading.

Because the notation requirement itself is unreasonable under 49 U.S.C. 10701(a), further discussion of the filed rate doctrine and equitable defenses is unnecessary.

Negotiated rates. These shipments assertedly were tendered to Orscheln because competitive rates satisfactory to both the shipper and carrier had been negotiated and were to be filed with the Commission. However, the rates either were not effective at the time of transportation (in the case of the first group) or were never filed at all (in the case of the other 20 shipments). Consequently, we will analyze these facts with reference to *Negotiated Rates.*

Respondent claims that we have no authority to advise or authorize payment of charges below those contained in its tariff. These same jurisdictional arguments were made and discussed at length in our recent decision in No. MC-C-10991, *Wakefern Food Corporation* v. *Southwest Freight Lines, Inc.*, —— I.C.C.2d ——, served June 2, 1987 (*Wakefern*). In that case we held to be not valid assertions that the charges contained in an applicable tariff must be assessed in circumstances such as alleged here. We concluded that the recent decisions in *Negotiated Rates* and *Buckeye Cellulose Corp.* v. *L&N R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom. Seaboard System Railroad* v. *United States*, 794 F.2d 635 (11th Cir. 1986), confirm that section 10701(a) and section 10704 give us the authority to consider all the circumstances surrounding an undercharge suit.

In short, our jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case. As we explained in *Negotiated Rates*, neither *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. ——, 90 L.Ed2d 413, 106 S.Ct. 1922 (1986) nor *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) involved the question of equitable defenses to a claim for undercharges. Nor do they indicate that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express authority in section 10701(a). We are not abolishing the requirement in section 10761 that carriers must continue to charge the tariff rate. Rather the issue is simply whether we have the authority to consider all the circumstances surrounding complainant's claim to the benefits of the allegedly negotiated rate. The portions of *Square D* reaffirming that carriers must file their rates do not mean that we lack the authority to find, in an appropriate case, that allowing a carrier to collect the tariff rate would be unreasonable.

Our role in such cases is to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts, and determine: (a) whether collection of undercharges based on the rate contained in the published tariff would constitute an unreasonable practice and; (b) if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. *Negotiate Rates.*

Petitioner claims that the negotiated rates which applied only to Zenith are indicative of contract carrier service and support a finding that Orscheln had *de facto* created a contract carrier operation tailored specifically to meet Zenith's transportation needs. Zenith avers that the negotiated rates were the functional equivalent of unpublished contract schedules, which would have permitted

Orscheln, as a contract carrier, to commence service immediately under the negotiated rates.

Respondent does acknowledge that the Commission has accepted equitable defenses in tariff applicability cases on occasion, most recently in *Buckeye*. Respondent argues, however, that the concept of equitable relief in undercharge cases is limited to situations such as those in *Buckeye* in which the carrier's conduct misled the shipper as to the applicable rate under a confusing tariff and the carirer did not intentionally and knowingly undercharge.

Finally, respondent attacks petitioner's position that Orscheln became a *de facto* contract carrier when it negotiated rates with Zenith. Respondent argues that 49 U.S.C. 10761(a) applies to common carriers and is applicable here. It questions the authority of the Commission through any rulemaking proceeding or policy statement to give legitimacy to negotiated but unfiled rates.

Intervenors agree with petitioner's allegation that these shipments were based upon an alleged negotiated but unfiled tariff. They aver that, even in the absence of any deliberate fraud, there are strong equities in support of holding the parties to the bargain made at the time the shipments were transported.

Negotated Rates was intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carrier negotiated and agreed on a rate that was not published in a tariff. Such a showing has elements of contract law, *e.g.*, offer, acceptance, reliance, etc. In *Buckeye*, we discussed the shipper's good faith reliance on a carrier's long term rate misquotation, and concluded that the shipper should not later be penalized for, in those circumstances, reasonable reliance on the carrier's representations. In that case, there was: (1) evidence showing a long period of misquotation; and (2) direct testimony of oral and written communications with the carrier during which the misquote was confirmed.

Here, Zenith argues that it was induced by misrepresentations by Orscheln to use its service for these shipments. Our *Negotiated Rates* policy statement does not provide that, upon allegations of a shipper, we will automatically accept the shipper's assertions that it was misled by carrier quotations. While Zenith's former Manager of Domestic Transportation Planning and Control testified that Orscheln quoted rates between Spring and Evansville, and from Springfield to Zenith's distributors, and that Zenith relied on them, we must consider all of the testimony.

A decision in favor of the shipper under the *Negotiated Rates* precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote.

In this case two of Orcheln's senior officials, its Regional Manager and its Special Representative, allegedly negotiated two sets of rates below those in the tariffs on file.[9] There is no written agreement explicitly stating the terms of the contract, but we can infer the understanding of the parties from the facts of record. A contract impied in fact is an agreement which depends for its existence on some act or conduct of the parties sought to be charged, and arises by inference or implication from circumstances which according to the ordinary course of dealing and the common understanding of men show a mutual intention by the parties to contract with each

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[9] An issue the parties do not directly address is whether the officials that petitioner relied on had the apparent authority to enter into the negotiations and to bind the carrier to the agreement. As stated in *Wakefern*, reliance must be "reasonable" and a finding may depend on whether the carrier's employee(s) could reasonable have been assumed to have pricing responsibility. Here, the regional manager and a special representative negotiated for the carrier, and we believe that shipper can legitimately rely on representations made by these management officials.

other. *Ross* v. *Raymer* 32 Wash2d 128, 201 P2d 129 (1948). Here, we have evidence of an offer, mutual acceptance by the parties, performance and payment of consideration. The only issue is the amount of consideration that should have been paid.

As to the 20 shipments of finished products, petitioner shows that there were negotiations, that there was a negotiated and agreed upon rate of $4.25 per cwt, and that Orscheln billed petitioner at that $4.25 per cwt rate. Respondent does not challenge this evidence. Therefore, we find that as to the 20 shipments of finished products paid for at the negotiated rate, it would be an unreasonable practice to allow respondent to collect undercharges on the tariff rate.

With regard to the remaining shipments billed and paid at the rate specified in a tariff not yet effective at the time of transportation, there is dispute between the parties as to the existence of negotiations. Petitioner presents evidence from a former employee naming specific senior officials, dates, and locations of the alleged negotiations. Orscheln also billed petitioner at the subsequently filed rate for the service provided, and petitioner paid the charges at that rate. This evidence is very credible in establishing that the parties had agreed to that rate prior to the transportation and that Zenith had good reason to believe the rate was effectively filed. This revise dates in his statement. Respondent attempts to refute the allegations made by petitioner, but it is apparent that respondent's evidence is not as credible as petitioner's. Instead of presenting statements from one or both of the Orscheln officials who allegedly negotiated reduced rates with petitioner's resperesentative, respondent only denies the allegations. It does not offer any explanations as why these individuals could not have negotiated the reduced rates, such as facts showing they lacked negotiating authority. Therefore, we conclude that the rates initially charged for the 51 [or 57] shipments of

television cabinets from Evansville to Springfield were properly paid on the basis of tariff schedules represented as filed and effective and applicable to the transportation provided. It would be an unreasonable practice for respondent to collect the tariff rate for the shipments based upon the mutually negotiated reduction in rates entered into between petitioner and two senior Orscheln officials.

This action will not significantly affect either the quality of the human environment or energy conservation.

We find:

It is not a reasonable practice for respondent Orscheln to collect the asserted undercharges for the shipments described in this proceeding. The charges originally assessed by respondent and paid by Zenith are the maximum that should be applied to the shipments under considerations here.

It is ordered:

1. This proceeding is discontinued.

2. A copy of the decision will be mailed to the United States District Court for the Northern District of Illinois, Eastern Division.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

NORETA R. MCGEE
Secretary

(SEAL)